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A

TREATISE ON FACTS

AS

SUBJECTS OF INQUIRY BY A JURY.

BY JAMES RAM,

OF THE INNER TEMPLE, M.A. CAMBRIDGE, BARRISTER-AT-LAW.

"Je ne dis rien que je n'appuie
De quelque exemple."—La Fontaine.

FIRST AMERICAN EDITION.

BY JOHN TOWNSHEND,

COUNSELLOR-AT-LAW.

WITH AN APPENDIX,

CONTAINING

DAVID PAUL BROWN'S GOLDEN RULES FOR THE EXAMINATION OF A WITNESS,
COX'S PRACTICAL ADVICE FOR CONDUCTING THE EXAMINATION OF WITNESSES,
WHEWELL ON THEORY AND FACT.

E. G. Ryle.

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PUBLISHERS' PREFACE.

The following work, by an author of acknowledged merit, is now for the first time republished in this country, and brought fairly to the notice of the legal profession in the United States. Although comparatively unknown here, the work has long enjoyed a high reputation in England, and those gentlemen, who, through the publishers of this, have possessed themselves of English copies, are unanimous in their commendation of it, both as regards the subject-matter and the style and manner of execution. The work embodies the results of great learning, large experience, and acute observation, with an extraordinary affluence of apt illustrations from all possible sources; and these results are communicated in the clearest and most agreeable form.

The work is designed primarily for lawyers, and has for them, whether as students or practitioners, an especial interest; nevertheless, it contains so much of sound thought and sagacious suggestion as makes it of rare interest to a large circle of intelligent readers outside of the legal profession.

The author has so well performed his self-allotted task and so faithfully fulfilled the motto upon his title page, as to leave little room for addition, and still less (his index excepted) for improvement. Yet the publishers believed the value of the work might be enhanced by passing it through the hands of a competent

editor. With this view they secured the services of Mr. Townshend, the author of the Treatise on Slander and Libel, and other works favorably known to the profession, and he has edited the work now presented to the public.

This contains all the text of the original edition (save a few poetical quotations omitted, the reference to them being retained), in the same form and order as in the original, with additional foot notes—the latter distinguished by being enclosed within brackets [ ]. The tables of contents, of names of cases cited, and of authors and books quoted, together with the appendix and index (the latter very full), are the work of the American editor. The English edition has but a very brief index and no prefatory tables.

To add to the practical purposes of the volume, David Paul Brown's "*Golden Rules for the Examination of Witnesses*," Cox's "*Practical Advice for Conducting the Examination of Witnesses*," and Whewell's "*Theory and Fact*," have been placed in an Appendix. These articles are quite in harmony with the character of Mr. Ram's Treatise, and add very materially to the value of the work.

The publishers flatter themselves that the reproduction of this work, with the additions as now presented, will be esteemed as a valuable contribution to the legal literature of the country.

If obliged to characterize the book in a single sentence, we should call it "The Philosophy of Evidence." It shows how we acquire our knowledge of facts; the circumstances which impede or facilitate the acquisition of that knowledge; the means by which the knowledge, when obtained, is either lost or perpetuated; the difficulties in the way of communicating a knowledge of

facts from one to another; the methods of distinguishing between truth and falsehood, and by which to test the value of human testimony. Together with a chapter upon ADVOCACY, and another upon THE EXAMINATION OF WITNESSES. The whole calculated to assist in the acquisition of that most difficult accomplishment—the art of trying a cause before a jury.

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A

TREATISE ON FACTS

AS

SUBJECTS OF INQUIRY BY A JURY.

CHAPTER I.

INTRODUCTORY.

Subjects of Jurisprudence are, Facts and Laws: facts are the source and the cause of laws. From facts proceed rights and wrongs; both requiring the government of law,—to establish and enforce the one; to restrain and punish the other.

By fact is here meant, any thing that is the subject of testimony, any thing that a witness rightly testifies to be a fact. If a thing be perceived by any sense of the body, or faculty of the mind, the perception is a fact. If any thing is seen or heard, the seeing or hearing of it is a fact. If any emotion of the mind is felt, as joy, grief, anger, the feeling of it is a fact. If the operation of the mind is productive of an effect, as intention,* knowledge, skill, the possession of this effect

* [Intention is a fact (Clift *v.* White, 12 N. Y. 538; and see Moss *v.* Riddle, 5 Cranch, 351; Miller *v.* The People, 5 Barb. 203; Griffin *v.* Cranston, 1 Bosw. 281), hence a witness may be asked with what intent he did an act (Seymour *v.* Wilson, 14 N. Y. 567; Griffin *v.* Marquardt, 21 N. Y. 121; Forbes *v.* Waller, 25 N. Y. 439; Bedell *v.* Chace, 34 N. Y. 386). But his evidence is not conclusive (Griffin *v.* Marquardt, 21 N. Y. 121;

is a fact. If any proposition be true, whatever is affirmed or denied in it is a fact. A. said this or that, or

---

Thurston *v.* Cornell, 38 N. Y. 287). And it seems this question is not permissible in certain cases, as where the intent may be or must be inferred from the act (The People *v.* Saxton, 22 N. Y. 309; Parker Mills *v.* Jacot, 8 Bosw. 161; Ballard *v.* Lockwood, 1 Daly, 164).

There is, or is supposed to be, a distinction between matters of fact and matters of opinion,—see this distinction discussed (Haight *v.* Hoyt, 19 N. Y. 468; also in an Essay on the Influence of Authority in Matters of Opinion, by George Cornewell Lewis, and a review of that work, Edinburgh Review, April, 1850; Whateley's Logic; and the distinction is noticed, Root *v.* King, 7 Cow. 629). In Lawrence *v.* Wright, 2 Duer, 647, the court speaks of "physical facts;" and in Mann *v.* Morewood, 5 Sandf. 566, of "real traversable facts."

It is a frequent subject of inquiry and debate, whether certain words or phrases imply questions of fact, or questions of law, or both, or are conclusions of law. The following collection of decisions on the subject cannot fail to be useful:

The following words and phrases have been held to imply QUESTIONS OF FACT: Negligence (Tobin *v.* Murison, 5 Moore's P. C. Cas. 110; Bernhardt *v.* Rensselaer R. R. Co. 32 Barb. 165; aff'd. 23 How. Pr. R. 166; Mettlestadt *v.* Ninth Ave. R. R. Co. 4 Robertson, 377; Ginnon *v.* Harlem R. R. Co. 3 Id. 26; Buckingham *v.* Payne, 36 Barb. 81; but see Purvis *v.* Coleman, 1 Bosw. 321; Mangam *v.* Brooklyn R. R. Co. 36 Barb. 237; Foot *v.* Wiswall, 14 Johns. 304). Diligent inquiry (3 N. Y. 274). Unlawfully converted (Cowell *v.* Hill, 6 N. Y. 381; Decker *v.* Matthews, 12 N. Y. 324; but see Ensign *v.* Sherman, 13 How. Pr. R. 37: 14 Id. 422; Fletcher *v.* Calthrop, 1 New Mag. Cas. 541). Instigation and request (Ives *v.* Humphries, 1 E. D. Smith, 200). Reorganization (Hyatt *v.* McMahon, 25 Barb. 458). That indorsements on notes were made "as surety" (Dow *v.* Platner, 16 N. Y. 567). Necessity (McCullough *v.* Moss, 5 Denio, 507). Possession (Parsons *v.* Brown, 15 Barb. 593). That a vessel "was not engaged in any illicit trade" (Ocean Ins. Co. *v.* Francis, 2 Wend. 72). That "a bill was presented for payment and payment demanded" (Graham *v.* Machado, 6 Duer, 514). That plaintiff became the owner by purchase (Prindle *v.* Caruthers, 15 N. Y. 427). That plaintiff was seized as of fee (Vigers *v.* Dean of St. Paul's, 14 Jur. 1017). That a woman is the *widow* of a particular man, naming him, or that a person is the son of another man, naming him (Semble, Reg. *v.* Inh. of Aberdaron, 1 New Mag. Cas. 51). Reputed ownership (Edwards *v.* Scott, 1 M. & G. 962; 2 Sc. N. R. 266). Sound or unsound (Lewis *v.* Peake, 7 Taunt. 153). What is actual, and what constructive, possession (O'Callaghan *v.* Booth, 6 Cal. 63). Reasonable time (Fry *v.* Hill, 7 Taunt. 397; Pitt *v.* Shew, 4 B. & Ald. 206; Facey *v.* Hurdom, 3 B. & C. 213; Tenant *v.* Bell, 16 Law Jour. Rep. M. C. 31; Burton

did this or that: if these propositions be true, then that A. did so say, or did so do, is a fact.*

* Wordsworth's Tale of Lucy Gray consists exclusively of facts. For an example of testimony of facts, see Romeo and Juliet, A. v. S. 3.

v. Griffiths, 11 M. & W. 817; Sage *v.* Hazard, 6 Barb. 179; Conger *v.* Hudson River R. R. 6 Duer, 375; Serle *v.* Norton, 2 M. & Rob. 401; see Van Trot *v.* McCulloch, 2 Hilton, 272; Gallagher *v.* White, 31 Barb. 92; Green *v.* Haines, 1 Hilton, 254; Lawrence *v.* Ocean Ins. Co. 11 Johns. 241; and see 9 Abb. Pr. Rep. 116, 124). Whether a sale was *completed* or not (De Ridder *v.* McKnight, 13 Johns. 294). Whether or not *reasonable* search has been made for a lost document to authorize secondary evidence of its contents (Clarke *v.* Owens, 18 N. Y. 435). When an undated instrument was made (Coons *v.* Chambers, 1 Abb. Pr. R. 165). Usual covenants (Bennett *v.* Wornack, 3 Car. & P. 96). Whether an abandonment was or was not accepted (Bell *v.* Smith, 2 Johns. 98). Ordinary care (Aymar *v.* Astor, 6 Cow. 267). Seaworthy or not (Sherwood *v.* Ruggles, 2 Sand. 55; Patrick *v.* Hallett, 1 Johns. 241; Clifford *v.* Hunter, 3 Car. & P. 16). Deviation (Child *v.* Sun Mut. Ins. Co. 3 Sand. 26). Necessary furniture (Willson *v.* Ellis, 1 Denio, 462; Whitmarsh *v.* Angle, 3 Code Rep. 53). Fraud (Erwin *v.* Voorhies, 26 Barb. 127; but see Question of Law, Fraud). Usual length of a voyage (Mackay *v.* Rhinelander, 1 Johns. Cas. 408).

The following words and phrases have been held to imply Questions of Law: What constitutes an account stated (Lockwood *v.* Thorn, 11 N. Y. 170). The sufficiency of the notice of the dishonor of a note, where there is no dispute about the facts (The Cayuga Co. B'k *v.* Warden, 6 N. Y. 29: Dole *v.* Gold, 2 Barb. 490; Farmers' B'k *v.* Vail, 21 N. Y. 487). Probable cause, reasonable cause (Bulkley *v.* Keteltas, 1 Hilton, 45; 6 N. Y. 384: Ransford *v.* Copeland, 6 Adol. & El. 482). That a written instrument is or is not a mortgage (Fairbanks *v.* Bloomfield, 2 Duer, 353). Seasonable times (Bell *v.* Wardell, 2 Willes, 204). Reasonable notice (Tindall *v.* Brown, 1 T. R. 167; Williams *v.* Smith, 2 B. & Ald. 496; Schiebel *v.* Fairbairn, 1 Bos. & Pul. 388). Whether a receipt is a bailment or sale (Wadsworth *v.* Allcott, 6 N. Y. 64). Whether a contract has been rescinded or not (Healey *v.* Ulty, 1 Cow. 345). Fraud (Sturtevant *v.* Ballard, 9 Johns. 337; Jennings *v.* Carter, 2 Wend. 446; Gage *v.* Parker, 25 Barb. 141; Erwin *v.* Voorhies, 26 Barb. 127; Edgell *v.* Hart, 9 N. Y. 213).

The following words and phrases have been held to imply Questions mixed of Law and Fact: Necessaries or not necessaries (Wharton *v.* McKenzie, 5 Q. B. 606). Due diligence (Carroll *v.* Upton, 3 N. Y. 272). That the company was illegally associated (Ransford *v.* Copland, 6 Adol. & El. 482). Duly (Gillet *v.* Fairchild, 4 Denio, 83; Beach *v.* King, 17 Wend. 17; White *v.* Joy, 13 N. Y. 86). "Duly convened" implies regularly convened (The People *v.* Walker, 2 Abb. Pr. Rep. 422). Flagrant

A fact, once in complete existence, once ended, admits of no addition, no subtraction; "nothing can

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nuisance (Hartz *v.* Long Island R. R. Co. 13 Barb. 647, 657). Negligence (Purvis *v.* Coleman, 1 Bosw. 321; but see QUESTIONS OF FACT, *ante*). Whether or not defects in articles sold were visible (Birdseye *v.* Frost, 34 Barb. 367). Due course of law (Backus *v.* Shepherd, 11 Wend. 629; Penniman *v.* Hudson, 14 Barb. 579; Thomas *v.* Woods, 4 Cow. 173; Cumpston *v.* McNair, 1 Wend. 457).

The following words and phrases have been held to be CONCLUSIONS OF LAW: That one is owner (Adams *v.* Holley, 12 How. Pr. R. 330; Thomas *v.* Desmond, Id. 321; *contra*, see Davis *v.* Hoppock, 6 Duer, 256; Walter *v.* Lockwood, 23 Barb. 233). That one is holder and owner (Brown *v.* Ryckman, 12 How. Pr. R. 313; Witherspoon *v.* Van Dolar, 15 Id. 266). That certain goods are the *property* of A. (Id.) That one is *indebted*, or remains indebted (Chamberlain *v.* Kaylor, 2 E. D. Smith, 139; Hall *v.* Southmayd, 15 Barb. 32). That it was, or is, the *duty* of a party to do or forbear an act (City of Buffalo *v.* Holloway, 7 N. Y. 493; Rex *v.* Everett, 8 B. & C. 114). That a settlement had "no *reference* to this claim, nor was the same in any way *released* or *affected*" (Jones *v.* Phœnix Bank, 8 N. Y. 235). That "he had fully determined to proceed" (Id.) That "he had failed to fulfill his obligations" (Van Schaack *v.* Winne, 16 Barb. 95). "Lawful title," and "unlawfully withholds" (Lawrence *v.* Wright, 2 Duer, 674; see, however, Walter *v.* Lockwood, 23 Barb. 233; Ensign *v.* Sherman, 14 How. Pr. Rep. 439, overruling S. C. 13 Id. 35). "In violation" (Schenk *v.* Nalor, 2 Duer, 678). "Duly authorized" (Myers *v.* Machado, 6 Abb. Pr. Rep. 198). That one is "liable" (Rex *v.* Upton-on-Severn, 6 C. & P. 133). "Repeated acknowledgments" (Bloodgood *v.* Bruen, 8 N. Y. 366). "That a note had no validity" (Burrall *v.* Bowen, 21 How. Pr. R. 378). That he did not, by his agreement, "undertake to convey the land free from all incumbrances" (Warner *v.* Hatfield, 4 Blackf. 394). That actions "were discontinued" (Hatch *v.* Peet, 23 Barb. 583). That the defendants have acted contrary to the act [statute] (Smith *v.* Lockwood, 13 Id. 209). That the defendant "was *bound* to repair" (Casey *v.* Mann, 5 Abb. Pr. R. 91). That one is the "lawful holder" (Beach *v.* Gallup, 2 Code R. 66; but see Taylor *v.* Corbiere, 8 How. Pr. R. 387). "*Bona fide* holder and owner" (White *v.* Brown, 14 Id. 282). "Sole owner" (Thomas *v.* Desmond, 12 Id. 321; see, however, Holstein *v.* Rice, 15 Id. 1). "As such attorney" (*Ex parte* Webb, 1 New Prac. Cas. 213). That a party "did execute a release in full" (Hatch *v.* Peet, 23 Barb. 575). That one party is "nearer of kin" than another (Public Adm. *v.* Watts, 1 Paige, 348). That an act is "unjust" (Re Prime, 1 Barb. 352). That a certain sum is "*due*" (McKyring *v.* Bull, 16 N. Y. 303; and see Allen *v.* Patterson, 7 N. Y. 480). That a sum is "due and owing" (Ketcltas *v.* Myers, 3 E. D. Smith, 83). That a note never had any validity (Burrall *v.* Bowen, 21 How. Pr. R. 378). Ad-

be put to it, nor any thing taken from it;" * once in existence, it is irrevocable.†

That, once in existence, a fact is irrevocable, is a fearful truth in contemplating crime. Lady Macbeth, to her sorrow, felt, "what's done, cannot be undone." ‡

A fact in a particular group of facts, or story, is not necessarily confined to that group: one and the same fact may form one of another group, of another and different story. The clock of the village church strikes; it announces to laborers the time for their leaving off work, and they then return home. The same striking of the clock tells to those surrounding the bed of a dying man, the time of his soul's departure.

One and the same fact, forming a part of different stories, may relatively to one story be very unimportant; and relatively to another, be of the utmost consequence. While, in the evening, the village church clock strikes eight, a child, a little girl is sitting on a stile in a field, in which a laborer is still working, and through a gate in which a boy is driving sheep; and close to the side of a hedge, in the adjoining field, a man is slowly walking. Now, relatively to the girl, the laborer, and the boy, or a story including them alone, and without the man in the adjoining field, the striking of the clock may be very immaterial; but relatively to the girl and the man walking under the hedge in the

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verse possession (Monroe *v.* Merchant, 36 Barb. 383; Bowie *v.* Brahe, 3 Duer, 35). Assent (Moore *v.* Westervelt, 2 Duer, 59; 1 Bosw. 357; 21 N. Y. 103; and see Keneys *v.* Richards, 11 Barb. 312). Whether a carrier is bound to know the contents of packages (Birley *v.* Newton, 10 Abb. Pr. R. 490). What is the meaning, validity, and effect of a contract (Latham *v.* Westervelt, 26 Barb. 256; Chapin *v.* Potter, 1 Hilton, 366). That an indebtedness "arose out of the transaction" (Brown *v.* Buckingham, 11 Abb. Pr. R. 387).]

* Eccl. iii. 14. † Hor. Carm. lib. iii. c. 29, 45–48.

‡ Macbeth, A. v. S. 1.

next field, and other circumstances forming a different story, the striking of the clock may be of the greatest consequence. The girl hears the clock strike, and sees the man; the man is going to a farm-house not far off, and there, in the early part of the night, commits a robbery. For this the man is tried; and he is convicted, partly on the evidence of the child, who heard the clock strike eight, and at the time saw the man going in the direction of the farm-house. Again, under another state of circumstances, supposing at the time, or soon after the time, when the child heard the clock strike, and saw the man, a robbery was committed several miles off from this spot, and the man is suspected and tried for the robbery; the evidence of the child may prove where he was when it was committed, and this evidence, with the distance between the places, may fully establish an *alibi*, and cause the man to be acquitted.

From these examples we may see that, however simple and innocent and trivial facts in themselves may be, as the striking of the clock, and the sitting of the little girl on the stile, they may, notwithstanding, form part of a story of deep crime, and, amidst the other circumstances of the tale, be prominently important; may lead to the conviction of a prisoner, or to his acquittal.

Facts are subjects of inquiry by a jury when, upon them, some question arises which comes within their province to determine; as when a jury is assembled before a coroner, to decide upon the cause of a person's death; or before a commissioner in lunacy, or a court of law, to judge of the soundness of mind of a living person, or of one now deceased; or is assembled before a judge or court, in the ordinary course of trial of a question in a civil or criminal suit or proceeding.

In all these cases, the facts are given in evidence by witnesses; and, with the exception of letters, written contracts, and other documentary evidence, their testimony consists chiefly of facts, of which they have personal knowledge by their sight and hearing; and the foundation of this testimony necessarily is, the witnesses' original perception of the things seen and heard, the impression they made on their minds, and their present remembrance of them.

These sources of the witnesses' knowledge, the examination they undergo to extract and learn their evidence, and several other topics connected with testimony, and an inquiry before a jury, are the subjects of the following chapters.

CHAPTER II.

OF PERCEPTION.

A PERSON'S right perception of an object seen by him may depend on his situation relative to the object viewed—his nearness to, or distance from it; also on his capacity to see with perfect or sufficient distinctness an object far off: he may be able to discern clearly things at a great distance from him, or to see distinctly only objects near to him; that is, he may be either far-sighted, or near-sighted. His right perception of the object may also depend on the light by which it is seen, and therefore on the time—whether day or night. It may depend, also, on the length or shortness of the time he has in which to view the object; also on the freedom of his view from all obstruction at the time, from whatever cause, or however momentary. The sun shining full in the face of a person may very much obstruct his sight. And the same effect may be produced by falling snow, or dense rain, or smoke.*

"The sheriff anxiously interrogated these men whether any boats had left the vessel. They could not say—they had seen none—but they might have put off in such a direction as placed the burning vessel, and the thick smoke which floated landward from it, between their course and the witnesses' observation."†

"Louis gained an opportunity to ask Quentin privately—'My bonny Scot, thou hast an eye, I see; canst thou tell me who helped the Cardinal to a palfrey?

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* Virg. Æneis, viii. 251.

† Guy Mannering.

Some stranger, I should suppose; for, as *I* passed without stopping, the courtiers would likely be in no hurry to do him such a timely good turn." 'I saw those who aided his Eminence but an instant, Sire,' said Quentin; 'it was only a hasty glance, for I had been unluckily thrown out, and was riding fast to be in my place; but I think it was the Ambassador of Burgundy and his people.'" *

"I know not how long I might have been in bed, perhaps two hours, when I was partially awakened by a light shining upon my face; whereupon, unclosing my eyes, I perceived the figure of a man, with a candle in one hand, staring at my face, whilst, with the other hand, he held back the curtain of the bed. As I have said before, I was only partially awakened; my power of perception was consequently very confused; it appeared to me, however, that the man was dressed in a green coat; that he had curly brown or black hair, and that there was some thing peculiar in his look. Just as I was beginning to recollect myself, the curtain dropped." †

Light may give one person a great advantage over another in discerning objects:—Lord Lovat, in relating an attack which, in the darkness of evening, he and his followers made against Lord Athol's troops in Scotland, in 1698, the latter acting under an order of Government to capture Lord Lovat, recounts, that Lord Athol's troops, having lighted a number of fires, and begun to prepare their supper, and Lord Lovat having marched his men within musket-shot of the enemy, the men fired, and immediately threw themselves upon their bellies. The Athol troops instantly formed themselves behind their fires. He then adds, "If Lord

* Quentin Durward. † Borrow's Romany Rye, Vol. II. p. 59.

Lovat at this moment had had his whole force with him, the enemy might have been all cut to pieces, without the expense of ten men. He could observe their slightest movement by the light of their fires; and they were unable to perceive Lord Lovat or any of his men at the distance of twenty paces." *

A person's immediate right perception of an object seen by him may depend on his previous knowledge or ignorance of the kind of object he sees. If he has before seen any thing—an animal, a machine, an instrument, of the same kind as that he now beholds—he will probably at once see the nature of it, and determine in his mind what it is. This was Gulliver's case, when from the shore he discovered an island afar off; whilst his companion, the sorrel nag, was much slower in finding out it was an island at all. "I got," he says, "upon a height, and looking on every side into the sea, fancied I saw a small island toward the northeast. I took out my pocket glass, and could then clearly distinguish it about five leagues off, as I computed; but it appeared to the sorrel nag to be only a blue cloud: for, as he had no conception of any country beside his own, so he could not be as expert in distinguishing remote objects at sea, as we who so much converse in that element." †

Dr. Johnson, in the course of his journey in the Hebrides, met with some hills of which he says: "Of the hills which our journey offered to the view on either side, we did not take the height, nor did we see any that astonished us with their loftiness. Toward the summit of one there was a white spot, which I should have called a naked rock, but the guides, who had

* Memoirs of the Life of Simon Lord Lovat, p. 84, ed. 1797.

† Gulliver's Voyage to the Houyhnhnms, ch. x.

better eyes, and were acquainted with the phenomena of the country, declared it to be snow." *

It is very common to ask a witness, whether he must have seen such or such a thing done, if it had been done: as, for instance, a blow struck; and a usual reply is, "I think I must have seen it; it could not have been done without my seeing it." In many such cases, no doubt, what the witness says may be a just ground for the inference, that the blow was not struck, and yet it is possible that it was. The possibility is proved, if proof be needed, by the remarkable circumstances attending the assassination of the Duke of Buckingham, as thus related by Clarendon:

"This morning of St. Bartholomew, the Duke had received letters, in which he was advertised that Rochel had relieved itself; upon which he directed that his breakfast might speedily be made ready, and he would make haste to acquaint the king with the good news. The chamber, wherein he was dressing himself, was full of company, of persons of quality and officers of the fleet and army. . . . . He being ready, and informed that his breakfast was ready, drew towards the door, where the hangings were held up; and in that very passage, turning himself to speak with Sir Thomas Fryar, a colonel of the army, who was then speaking near his ear, he was on the sudden struck over his shoulder upon the breast with a knife; upon which he fell down dead, the knife having pierced his heart. No man had seen the blow, or the man who gave it." †

When the eye perceives an object, or the ear a sound, it is very often on a sudden. So, in their famed

* Journey to the Western Islands of Scotland, p. 60, ed. Edinb. 1798.

† Clarendon's History of the Rebellion, Vol. I. p. 28, ed. 1707.

retreat, did Xenophon and his ten thousand descry the wished-for sea.*

> "The sea at last from Colchian mountains seen,
> Kind-hearted transport round their captains threw
> The soldiers' fond embrace; o'erflowed their eyes
> With tender floods, and loosed the general voice
> To cries resounding loud—The sea! The sea!" †

So burst on Cæsar's gladdened eye the march of Pompey's army to Pharsalia's plains.‡

> "Things in motion sooner catch the eye
> Than what not stirs."§

The shining of the eye of a person lying in concealment is apt suddenly to betray him:

> "Bertram suspends his purpose stern,
> And couches in the brake and fern,
> Hiding his face, lest foemen spy
> The sparkle of his swarthy eye." ‖

To these lines Sir W. Scott adds this note: "After one of the recent battles in which the Irish rebels were defeated, one of their most active leaders was found in a bog in which he was immersed up to the shoulders, while his head was concealed by an impending ledge of turf. Being detected and seized, notwithstanding his precaution, he became solicitous to know how his retreat had been discovered. 'I caught,' answered the Sutherland Highlander, by whom he was taken, 'the sparkle of your eye.' Those who are accustomed to mark hares upon their form, usually discover them by the same circumstance."

Sometimes perception by the eye or ear is preceded by a voluntary and active operation of the mind, exercising its desire to perceive the object; as when one

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* Anabasis, iv. 7.
† Thomson's Liberty, Part II.
‡ Lucan, Phars. vii. 235.
§ Troilus and Cress. A. iii. S. 3.
‖ Rokeby, canto iii.

watches to see something, or listens to hear a voice or other sound.

"Presently a loud and furious hiss
Caused me to stop and to exclaim, 'What's this?'
When lo! upon the threshold met my view
With head erect, and eyes of fiery hue,
A viper." *

"List, list; I hear
Some far off halloo break the silent air." †

* * * * *

Look where Beatrice, like a lapwing, runs
Close by the ground to hear our conference." ‡

"As the sentinel directed his solitary walk betwixt the two entrances which formed the boundary of his duty, he was startled by a strain of music, which was suddenly waked, and which, at least in his imagination, was a combination of the same lute and voice, by which he had been enchanted on the preceding day. Planted on the spot where his ear could most conveniently drink in the sounds, Quentin remained with his harquebus shouldered, his mouth half open, ear, eye, and soul directed to the spot, without any other idea, than that of catching, if possible, each passing sound of the dulcet melody." §

"Behind one of the old oaks, shrouding himself from observation, like a hunter watching for his game, or an Indian for his enemy, Tyrrel lay on his breast near the Buck-stane, his eye on the horse-road, which winded down the valley, and his ear alertly awake to every sound, which mingled with the passing breeze, or with the ripple of the brook." ‖

"Going to the cart, I removed two or three things from it; I then lifted up the shafts, and was just going

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* Cowper's Colubriad.
† Comus.
‡ Much Ado about Nothing, A. iii. S. 1.
§ Quentin Durward.
‖ St. Ronan's Well.

to call to the pony to come and be fastened to them, when I thought I heard a noise. I stood stock still, supporting the shaft of the little cart in my hand, and bending the right side of my face slightly toward the ground, but I could hear nothing. . . . . There, I heard it again, a sound very much resembling the grating of a wheel amongst gravel. . . . Again I listened, and now I distinctly heard the sound of wheels; nearer and nearer they drew, and presently the sound of wheels was blended with the murmur of voices. . . . . Leaving my cart, I came forward and placed myself near the entrance of the open space, with my eyes fixed on the path, down which my unexpected visitors were coming. Presently I heard a stamping or sliding, as if of a horse in some difficulty; the next moment appeared a man and a horse and cart; the former holding the head of the horse up to prevent him from falling, of which he was in danger, owing to the precipitous nature of the path." *

To put the ear close to the ground is an approved way of listening for footsteps.† Prince Henry tells Fallstaff,—"Peace, ye fat-guts! lie down; lay thine ear close to the ground, and list if thou canst hear the tread of travelers." ‡

The eye has capacity to see many objects at one time. When in the presence of numerous objects, it may not see all, but it will of necessity see a great number of them. A man looking at a crowd of people necessarily sees at once many persons in it, although probably he will see only a few distinctly, and the rest after a confused manner.§

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* Borrow's Lavengro, Vol. III. ch. xviii.

† Romeo and Juliet, A. v. S. 3. ‡ Henry IV. Part I. A. ii. S. 2.

§ [Houdin, the celebrated prestidigitateur, relates how he and his son, for the purposes of their profession, cultivated the art of rapid visual observa-

So the ear has capacity to hear many sounds at one time; as many voices of persons simultaneously speaking; many songs of birds in a grove. And of the many sounds, the ear cannot avoid hearing some of them; as some of the voices, or songs; but it will not hear all with equally distinctive clearness.

"I remember a mass of things, but nothing distinctly; a quarrel, but nothing wherefore,"* was the state of Cassio's recollection, so soon as he recovered from his drunkenness, in which he had quarreled and fought with Montano. So, in the case of a riot or tumult, especially if sudden, it naturally happens that the minds of many, perhaps of most, persons present are very much confused, and observe nothing distinctly. Their minds are rapidly withdrawn from one object to another, so that they observe the scene rather in one mixed and indistinct mass, than in separate defined portions. They look here and there, on this side and that; in turn see different parts of what is going on; and there is very little that, separately from the mass, makes much impression on their minds.

In the crowd, however, there may be some persons, who have composure enough to prevent their minds being distracted by a multiplicity of objects, and can confine and fix their attention to particular matters only. And when the eye of the spectator has been attracted to some one thing, he may, for an especial reason—as, for instance, an interest he takes in what some one present may say or do—fasten his attention on this particular object, to the exclusion of others calculated to excite his notice. But in the absence of any

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tion, by walking past a store window, and then ascertaining how many objects they could enumerate and describe from this passing glance.—*Memoirs of Houdin*, 256.]

* Othello, A. ii. S. 3.

such cause of exclusive attention, the objects which will most attract the eye, will naturally be those, which are the most prominent in the scene. And it is certain that, during a riot or tumult, it is quite impossible for any one person to see distinctly all that takes place; since while he is looking in one direction, something else will surely be going on in another; and as different people may see different things, so this thing may escape the notice of one person, and that of another. And under such circumstances, a prudent man interrogated on the subject, after he has exhausted all he considers he can positively speak to, will, if urged or asked to say more, be inclined to say, as witnesses often have said,—"I know nothing further; that is all I saw of the business; I cannot pretend to say what passed besides."

When an object is at a great distance from a person looking at it, his perception of it may be very different from what it would be, if the object were near to him.

"Wordsworth has brought many a truth into life, both for the eye and for the understanding, which previously had slumbered indistinctly for all men. For instance, as respects the eye, who does not acknowledge instantaneously the magical strength of truth in his saying of a cataract, seen from a station two miles off, that it was 'frozen by distance'? In all nature there is not an object so essentially at war with the stiffening of a frost, as the headlong and desperate life of a cataract; and yet notoriously the effect of distance is, to lock up this frenzy of motion into the most petrific column of stillness. This effect is perceived at once when pointed out; but how few are the eyes, that ever would have perceived it for themselves!" *

* De Quincey's Sketches (Paper on Wordsworth's Poetry), p. 260, ed. 1857.

A person viewing an object, approaching from a great distance, gradually discovers the form and nature of it.

> "Far on the horizon's verge appears a speck,
> A spot—a mast—a sail—an armed deck." *

"I was somewhat struck when I saw one of my countrymen making his way across the wilderness. At first there was a mere moving speck in the horizon; soon it appeared that three laden camels were approaching, and that two of them carried riders; in a little while we saw that one of the riders wore the European dress: and at last the travelers were pronounced to be an English gentleman and his servant." †

Many of the observations before made on sight are also applicable to the sense of hearing. A person's right perception of a sound heard by him may depend on his situation relative to the sound at the time of hearing, his nearness to or distance from it; also on his capacity to hear, with perfect or sufficient distinctness, a sound far off; it may depend on the freedom of his sense of hearing from all obstruction at the time, from whatever cause or however momentary.

The air of night is more favorable than that of the day, for the transmission of sound. Gray puts down in his journal, while visiting Keswick and its neighborhood,—"In the evening I walked down to the lake, by the side of Crow-park, after sunset. . . . . At a distance were heard the murmurs of many waterfalls, not audible in the day time." ‡

"This is certain, that whatever alterations are made in the body, if they reach not the mind; whatever impressions are made on the outward parts, if they are

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* The Corsair, canto iii. † Eöthen, ch. xvii.

‡ Gray's Works, Vol. II. p. 266, ed. 1807.

not taken notice of within; there is no perception. . . . . How often may a man observe in himself, that whilst his mind is intently employed in the contemplation of some objects, and curiously surveying some ideas that are there, it takes no notice of impressions of sounding bodies made upon the organ of hearing, with the same alteration that uses to be for the producing the idea of sound! A sufficient impulse there may be on the organ, but it not reaching the observation of the mind, there follows no perception; and though the motion that uses to produce the idea of sound be made in the ear, yet no sound is heard. Want of sensation, in this case, is not through any defect in the organ, or that the man's ears are less affected than at other times, when he does hear; but that which uses to produce the idea, though conveyed in by the usual organ, not being taken notice of in the understanding, and so imprinting no idea on the mind, there follows no sensation." *

In Scott's "Rokeby," canto i., are these lines:

> "Far townward sounds a distant tread,
> And Oswald, starting from his bed,
> Hath caught it, though no human ear,
> Unsharpened by revenge and fear,
> Could e'er distinguish horse's clank,
> Until it reached the castle's bank."

To these lines Sir Walter has added the note,—"I have had occasion to remark, in real life, the effect of keen and fervent anxiety in giving acuteness to the organs of sense." †

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* Locke on the Understanding, Book II. ch. ix. [Persons accustomed to sit in a room in which is a striking clock, very seldom are conscious of hearing it strike.]

† [An illustration of this is the case of Jessie Brown, at the siege of Lucknow. This young woman was in the besieged garrison, the expected relief failed to arrive, the prospect of capitulating drove her frantic, but she heard long before any other of the besieged the music played by the

A person may catch some only of, and not all, the words, which another speaks; and a consequence may be, that the words caught do not express the speaker's meaning. A ludicrous instance of this is contained in a story thus told by Hume:

"Some young gentlemen of Lincoln's Inn, heated by their cups, having drunk confusion to the Archbishop (Laud), were, at his instigation, cited before the Star Chamber. They applied to the Earl of Dorset for protection. 'Who bears witness against you?' said Dorset. 'One of the drawers,' they replied. 'Where did he stand when you were supposed to drink this health?' subjoined the Earl. 'He was at the door,' they replied, 'going out of the room.' 'Tush!' cried he; 'the drawer was mistaken: You drank to the confusion of the Archbishop of Canterbury's enemies; and the fellow was gone before you pronounced the last word." *

Frequently it is the latter part of what is said that is heard, and not the beginning. A variety of causes may occasion this; as noise at the commencement, the low tone of the speaker's voice at that time, or the circumstance that the hearer's attention was not attracted to the speaker, until he had advanced in what he was saying.

Writers, ancient and modern, agree, that the eye perceives quicker and better than the ear. †

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band accompanying the soldiery approaching to relief of the garrison. When she called attention to the sound, it was regarded as a delusion of her distempered imagination.]

* Hume's Hist. Vol. VI. p. 251, ed. 1763.

† "The business of the drama must appear
In action or description. What we hear,
With weaker passion will affect the heart,
Than when the faithful eye beholds the part."—FRANCIS.

Cic. De Orat. ii. 87. *Hor. De Art. Poet.* 180. *Ovid, De Ponto, lib.* iii. *el.* 4, 21.

Simonides, or some one else, has observed that those things are most

Hooker remarks, "That which we drink in at our ears doth not so piercingly enter, as that which the mind doth conceive by sight." * Hooker also says of the eye, that it is "the liveliest and the most apprehensive sense of all other;" and he thinks that things presented to the eye are more fit than words to make a deep and strong impression; that actions are better remembered than words; and to this cause he refers the use of ceremonies performed on many occasions. "We must not think," he says, "but that there is some ground of reason, even in nature, whereby it cometh to pass, that no nation under heaven either doth, or ever did, some public actions which are of weight, whether they be civil and temporal, or else spiritual and sacred, without some visible solemnity; the very strangeness whereof, and difference from that which is common, doth cause popular eyes to observe and to mark the same. Words, both because they are common, and do not so strongly move the fancy of man, are, for the most part, but slightly heard; and

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fixed in the memory, which our senses have conveyed there; and that sight is the most acute of all our senses; and, for this reason, what we have heard we can best remember, when the hearing was accompanied by sight. [In the report of the trial of Saurin *v.* Starr, known as The Great Nunnery Case, the reporter has this note to the proceedings on the ninth day of the trial: To-day the principal sensation was caused by the production of the worn out stockings and other clothing brought by the plaintiff from the convent in Yorkshire, and of various articles mentioned in the evidence. On the occurrence of this spectacular incident, there was very noticeable excitement in court. Realism seldom fails to heighten the effect of language, even when those to whom the double argument is addressed are men of intellect and culture. If proof were needed that ocular illustration commands a readier and more attentive notice, from the high as well as the low in mental condition, than the clearest statement, or most forcible appeal that words will carry, such proof was this day given in the Court of Queen's Bench.]

* Hooker's Sermon on the Nature of Pride, Vol. III. of his Works, p. 391, ed. 1822.

therefore, with singular wisdom it hath been provided, that the deeds of men, which are made in the presence of witnesses, should pass not only with words, but also with certain sensible actions, the memory whereof is far more easy and durable than the memory of speech can be." * Corresponding with what Hooker says, is this observation of Dr. Johnson on nations "where there is hardly the use of letters:" "Their only registers are stated observances and practical representations. For this reason, an age of ignorance is an age of ceremony. Pageants, and processions, and commemorations, gradually shrink away, as better methods come into use of recording events and preserving rights." †

Bishop Lowth, in his lectures on Hebrew poetry, thus speaks of the eye: "Of the assemblage of images, which the human mind collects from all nature, the least clear and evident are those, which are explored by reason and argument; the more evident and distinct are those, which are formed from the impressions made by external objects on the senses; and of these, the clearest and most vivid are those, which are perceived by the eye. Hence, poetry abounds most in those images, which are furnished by the senses, and chiefly those of the sight, in order to depict the obscure by the more manifest, the subtile by the more substantial." ‡

Professor Wilson's "Noctes" contains this passage on sight and hearing:

"The memory seems to have more command over

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* Hooker's Eccles. Pol. B. IV. Vol. I. of his Works, p. 303, ed. 1822.

† Journey to the Hebrides, p. 108, ed. Edinb. 1798. [Mr. Mayne in his Treatise on Ancient Law, (p. 280, English ed.) speaks of the "perplexed ceremonies in which ancient law delights."]

‡ Lowth's Lectures on the Sacred Poetry of the Hebrews, Part II. sect. v. p. 67, ed. 1847.

sights than over sounds. We can shut our eyes, yet see all nature. But music, except when it breathes, has no residing place within the cells of the ear. So faint, so dim the dream, it hardly can be said to be, till one single note awakes, and then the whole tune is suddenly let loose upon the soul."

Some persons are gifted with an extraordinary power of seeing objects afar off. "The Bedouin, so often engaged in irregular warfare, strains his eyes to the horizon in search of a coming enemy, just as habitually as the sailor keeps his 'bright look out' for a strange sail. In the absence of telescopes, a far reaching sight is highly valued, and Lady Hester (Stanhope) possessed this quality to an extraordinary degree. She told me that on one occasion, when there was good reason to expect hostilities, a far-seeing Arab created great excitement in the camp, by declaring that he could just distinguish some moving objects upon the very farthest point within the reach of his eyes; Lady Hester was consulted, and she instantly assured her comrades in arms, that there were indeed a number of horses within sight, but that they were without riders; the assertion proved to be correct, and from that time forth her superiority over all others, in respect of far sight, remained undisputed." †

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* Wilson's Noctes Ambrosianæ, Vol. II. p. 256, ed. 1855.

† Eöthen, ch. viii. p. 93, 5th ed.

CHAPTER III.

OF IMPRESSION.

There is a capability in the mind to receive on it an impression of things it perceives. Whenever a man sees or hears any thing, what he sees or hears probably makes some impression on his mind; but often the impression is so slight and transitory, that all trace of it is soon gone. The mind is attentive to what it sees or hears, more or less, according to circumstances; and in dependence on them, the impression of it is strong or weak, clear or obscure. The strength or clearness of the impression may also depend on the power or fitness of the eye or ear to receive it. The language of Locke, when speaking of the causes of obscurity in ideas, seems here to be applicable. "If," he says, "the organs or faculties of perception, like wax over-hardened with cold, will not receive the impression of the seal, from the usual impulse wont to imprint it; or, like wax of a temper too soft, will not hold it well when well imprinted; or else, supposing the wax of a temper fit, but the seal not applied with a sufficient force to make a clear impression; in any of these cases, the print left by the seal will be obscure." *

One man may pass another, and in passing see him, and yet the sight of him may make little impression on his mind. He may have but a very slight impression of his features, height, or dress. But if he look at him purposely to inform himself of his features, stature,

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* Locke on the Understanding, Book II. ch. xxix.

or dress, then probably the impression will be deep. A man met on an unfrequented path attracts attention; while, if encountered on a high-road, he might pass unregarded. An unusual gait, manner, or dress of a person excites notice. An unusual sight or sound may be deeply impressed on the mind; as the sight of a wounded man, or a shriek of alarm. If a pistol, knife, or other formidable weapon, is seen in the hand of a man, in a place, or at a time, which does not sort with his armed appearance, attention is drawn to him.

"Upon that night (a peasant's is the tale)
A serf that cross'd the intervening vale,
When Cynthia's light almost gave way to morn,
And nearly veil'd in mist her waning horn;
A serf, that rose betimes to thread the wood,
And hew the bough that bought his children's food,
Pass'd by the river that divides the plain
Of Otho's lands and Lara's broad domain:
He heard a tramp—a horse and horseman broke
From out the wood—before him was a cloak
Wrapt round some burthen at his saddle-bow,
Bent was his head, and hidden was his brow.
Roused by the sudden sight at such a time,
And some foreboding that it might be crime,
Himself, unheeded, watched the stranger's course." *

It may be strongly impressed on the mind, that among an assemblage of persons, some distinguished man, one eminent by his rank, by his military services, or by his scientific knowledge, was one of the persons assembled. So it may make an impression, that a person was there, about whom there was something remarkable, as language or dress seldom heard or seen. In like manner, there may be impressed on the mind a particular conversation in a company: one embracing a novel view of a subject; a narrative riveting attention by its unusual incidents.

* Lara, canto ii. st. 24.

"Me in particular (to whom the Irish leaders of society were as yet entirely unknown by sight) it gratified highly to see persons of historical names—names, I mean, historically connected with the great events of Elizabeth's or Cromwell's era—attending at the Phœnix Park. But the persons whom I remember most distinctly of all whom I was then in the habit of seeing, were Lord Clare, the Chancellor, the late Lord Londonderry (then Castlereagh), at that time the Irish Chancellor of the Exchequer, and the Speaker of the House of Commons (Mr. Foster)." *

When we see a friend, who from any cause has become altered in his appearance since we saw him last, this change is likely to make a deep impression on the mind. Lord Malmesbury, in his Diary, thus mentions the impression made on him by Mr. Pitt's altered appearance the last time he saw him:

"On 3d November [1805] he and Lord Mulgrave came to me in Spring Gardens with a Dutch newspaper, in which the capitulation of Ulm was inserted at full length. As they neither of them understood Dutch, they came to me to translate it, which I did as well as I could; and I observed but too clearly the effect it had on Pitt, though he did his utmost to conceal it. *This was the last time I saw him.* He promised me to come for a few days to Park Place, on his return from Bath, where he was then going, but was too ill to keep his word. This visit has left an *indelible impression* on my mind, as his manner and look were not *his own*, and gave me, in spite of myself, a foreboding of the loss with which we were threatened." †

When one person hears another speak, the impres-

* De Quincey's Autobiographic Sketches, p. 225, ed. 1853.

† Diaries of the First Earl of Malmesbury, Vol. IV. p. 340, ed. 1844.

sion which the words uttered make on the mind of the hearer is frequently, not that of the very words, but of the sense or import of them. A witness, asked what he heard a person say, does in reply often mention particular words, but qualifies them by adding, "or something of that sort;" or "some such terms;" or "words to that effect;" or "some expression of that description;" "I don't pledge myself for the exact words, but certainly to that effect;" "I heard A. speak to B. to this effect: 'I think,' &c. I do not pretend to state A.'s words, but the substance I believe I am correct in."

It very often happens that words heard make no lasting impression:

> "I have slight memory of that walk—
> Argyle, I think, spoke earnestly
> On state affairs, but of his talk
> Not any word remains with me." *

An aid to impression is contemplation, by which we keep for some time actually in view any thing we see.†

> "The traveler who, with a heart at ease,
> Had seen the goodly vision, would have loved
> To linger, seeking with insatiate sight
> To treasure up its image, deep impress'd,
> A joy for years to come." ‡

It generally, perhaps, happens that when a person by his sight or hearing perceives something, and its concomitant circumstances, his mind is chiefly attentive to the thing seen or heard, which, therefore, is more deeply impressed on the mind than the accompanying circumstances are. If the thing be the launch of a vessel, the launch itself will be fixed more deeply in

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* Aytoun's Bothwell, Part III.

† Locke on the Understanding, Book II. c. x.

‡ Southey's Roderick, canto v.

the mind than the circumstances attending it: as, the time, the day or year of the launch, even the name of the vessel, the presence of particular persons assembled on the occasion. "So easily does mere external pomp slip out of the memory, as to all its circumstantial items, leaving behind nothing beyond the general impression, that, at this moment, I remember no one incident of the whole ceremonial [Installation of the knights of St. Patrick], except that some foolish person laughed aloud as the knights went up with their offerings to the altar; the object of this unfeeling laughter being apparently Lord Altamont, who happened to be lame—a singular instance of levity to exhibit within the walls of such a building [Cathedral of St. Patrick at Dublin], and at the most solemn part of such a ceremony." *

Any cause of abstraction of attention from an object may occasion that the object make a very small, or even perhaps no, impression on the mind.

"In a gambling house of that class, where you are at liberty to sit down to a splendid banquet, anxiety probably prevents your sitting down at all; but if you do, the same cause prevents your noticing what you eat." †

"She sate upon the galley's prow,
And seem'd to mark the waves below;
Nay, seem'd, so fix'd her look and eye,
To count them as they glided by.
She saw them not—'twas seeming all—
Far other scene her thoughts recall,—
A sun-scorch'd desert, waste and bare,
Nor waves, nor breezes, murmur'd there;
There saw she—where some careless hand

* De Quincey's Autobiographic Sketches, p. 226, ed. 1853.

† De Quincey's Miscellanies, the Casuistry of Roman Meals, p. 267, ed. 1854.

O'er a dead corpse had heap'd the sand,
To hide it till the jackals come,
To tear it from the scanty tomb." *

Suppose A. to be speaking in public, and B., one of his hearers, looks for a minute or so attentively at A. for a particular purpose, as to observe his action, or to ascertain whether he is speaking wholly *ex tempore*, or from notes, it is extremely probable that what A. says in this space of time, so employed by B., will be nearly wholly lost upon B., very slightly impressed on his mind, although, perhaps, necessarily the words, or rather, perhaps, the sound of the words, were heard by him.

One sound may drown another. "When I say firing," observed a witness on Frost's trial, "really the noise and din of breaking in the windows in the room where I was, was so great, that, although firing actually occurred, I could not distinctly swear that I heard any firing at all." †

There are persons who possess an inclination, which sometimes grows into a habit, particularly to notice things which they see or hear. Such notice of them necessarily tends to strengthen the impression. The inclination may arise from their judging the things they notice to be remarkable, and deserving of remembrance.‡

The same inclination may proceed from a person's having an object in view in collecting in his mind individual matters. Dr. Johnson observes on Swift's "Polite Conversation" and "The Direction for Servants"—"These two performances show a mind incessantly attentive, and when it was not employed upon

* Marmion, canto ii. † Frost's Trial (taken by Gurney), p. 193.

‡ See Romeo and Juliet, A. v. Sc. 1.

great things, busy with minute occurrences. It is apparent that he must have had the habit of noting whatever he observed, for such a number of particulars could never have been assembled by the power of recollection." *

Persons of a sensitive mind take an impression of minute things which they see and hear. Who can doubt that, not in mere poetic imagination, but in reality, Rogers, the poet, saw and heard, and took a deep impression of what he relates he saw and heard while standing in one of the temples at Pæstum.

"As alone I stand
In this, the nobler pile, the elements
Of earth and air its only floor and covering,
How solemn is the stillness! Nothing stirs
Save the shrill-voiced cigala flitting round,
On the rough pediment to sit and sing;
Or the green lizard rustling through the grass,
And up the fluted shaft with short quick motion,
To vanish in the chinks that Time has made." †

* Johnson's Life of Swift. † Rogers' "Lines written at Pæstum."

CHAPTER IV.

OF MEMORY.

THERE is a power in the mind to retain an impression of things perceived by the eye or ear. Every impression continues some portion of time. Of the continuance there are degrees, varying from an instant to many years. Numerous impressions, probably the greater number of them, wholly perish so soon as made. Impressions which do not thus quickly perish, have a storehouse in which they are kept, and which we call Memory. There they are retained for a longer or shorter time, according to circumstances. And probably this time, in many cases, is in proportion to the depth of the impression.*

Any thing new or extraordinary may make a deep impression, and so remain long in the memory; while other things of daily or common occurrence, making but little impression, soon glide from it.†

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* Locke on the Understanding, Book II. ch. x.

† Things of little importance, and which happen every day, we do not remember, because scarcely any thing but what is new, or surprising, makes much impression on the mind. But if we see or hear any thing extraordinarily bad or good, something unusual, gigantic, incredible, or very ridiculous, this we usually remember a long time. Things, likewise, of the present day, whether we see or hear them, we generally forget; but what happened in our boyhood, we often remember exceedingly well. And the only reason for this difference can be, that the common things of the present day easily escape from the memory; whereas things which were new and remarkable in boyhood, made then a deep impression on the mind. The rising and setting of the sun, and its constant course in the heavens, cause no attention, for this reason, that they take place daily; but eclipses of the sun are taken notice of, because they are not so com-

In the course of time, from a variety of causes, many impressions escape out of the memory, and are forever lost. How many impressions of persons and things we have seen and heard have entirely perished! How many impressions of once most familiar faces, of schoolfellows, fellow-travelers, of even brothers, sisters, children, parents!

"*North.* All dead—one after another—the friends in whom lay the light and might of my life—and memory's self is faithless now to the 'old familiar faces.' Eyes—brows—lips—smiles—voices—all—all forgotten! Pitiable, indeed, is old age, when love itself grows feeble in the heart, and yet the dotard is still conscious that he is, day by day, letting some sacred remembrance slip forever from him, that he once cherished devoutly in his heart's core, and feels that mental decay alone is fast delivering them all up to oblivion!

Shepherd. Sittin wi' rheumy een, mumblin wi' his mouth on his breist, and no kennin frae ither weans his grandchildren, wha have come to visit him wi' their mother, his ain bricht and beautifu' dauchter, wha seems to him a stranger passing alang the street." *

Wesley, upon commencing his 85th year, and enumerating his infirmities, says,—"I find, likewise, some decay in my memory with regard to names and things lately passed; but not at all with regard to what I have read or heard twenty, forty, or sixty years ago." And again, upon his 86th birth day, he says,—"My memory of names, whether of persons or places, is decayed, till I stop a little to recollect them." †

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mon; and eclipses of the sun are more observed than those of the moon, because these are more frequent.—*Cic. ad. Herennium*, iii. 22.

* Wilson's Noctes Ambrosianæ, Vol. III. p. 298, ed. 1856.

† Southey's Life of Wesley, Vol. II. pp. 557, 560, ed. 1820.

Mr. Wilberforce thus speaks of his own memory:—"I find my memory failing me—partly, I doubt not, from advancing years; but this effect accelerated and exaggerated by the incessant bustle in which I have lived, and by my not taking pains to obtain sufficiently deep impressions." *

While impressions are retained in the memory, there is a consciousness of the persons or things which made the impressions; a consciousness felt whenever we are thinking of them, and latent when they do not occupy our present thought. Thought of them is produced by a variety of powers, external to the memory, and whose office it is to cause the thought of them. For a property of memory is, that when touched by those powers, it gives up the persons or things which made the impressions; these persons or things then come before the mind's eye, and become the subject of thought. Between those powers and the persons or things they call forth, there is a certain affinity or association. The power may be, some person or thing we see, some voice or sound we hear; it may be a particular day of the year; it may be a thought passing in the mind of some other thing; it may be thought in search of the impression made; it may be a question put to us. And often the impression starts up and comes before us, unexpectedly, without the mind's searching for or at all thinking about it.

"Sounds do not always give us pleasure according to their sweetness and melody; nor do harsh sounds always displease. We are more apt to be captivated or disgusted with the associations which they promote, than with the notes themselves. Thus the shrilling of the field-cricket, though sharp and stridulous, yet mar-

* Wilberforce's Diary, Life of Wilberforce, Vol. III. p. 497, ed. 1838.

velously delights some hearers, filling their minds with a train of summer ideas of every thing that is rural, verdurous, and joyous." *

Cowper, in a letter to a friend, says,—"I have taken, since you went away, many of the walks which we have taken together, and none of them, I believe, without thoughts of you. I have, though not a good memory in general, yet a good local memory, and can recollect, by the help of a tree or a stile, what you said on that particular spot. For this reason I purpose, when the summer is come, to walk with a book in my pocket: what I read at my fireside I forget, but what I read under a hedge, or at the side of a pond, that pond and that hedge will always bring to my remembrance; and this is a sort of *memoria technica*, which I would recommend to you, if I did not know that you have no occasion for it." †

Cowper had a local memory, in the sense that place brought to his mind some impression it received at that place.

Coleridge usually remembered an object he saw, but not the place where he saw it. "I have," he says, "the perception of individual images very strong, but a dim one of the relation of place. I remember the man or the tree, but where I saw them I mostly forget." ‡

The song of an encaged thrush in a London street may bring before the eyes of a woman passing, her early habitation and its rural scenery, the cottage, hill, dale, river, and pastures. §

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* White's Nat. Hist. of Selborne, Letter 42.

† Cowper's Works (Letters), Vol. VI. p. 207, ed. 1836.

‡ Coleridge's Table Talk, Vol. I. p. 74, ed. 1835. See Rogers' Pleasures of Memory, Part I.; and Cowper's Walk at Noon.

§ Wordsworth's Reverie of Poor Susan.

How vividly did a "beautiful" night, existing in Lord Byron's imagination only, recall to his mind the reality of such a night seen in his youth, with all the incidents of the scene he viewed.*

What power there is in a keepsake, to call to mind the giver of it!

"*North.* I chanced to look at this ring—

Shepherd. What! The ane on your wee finger? The finest diamond ever glittered.

North. And the image of the Noble Being, in remembrance of whom I have worn it for twenty years, rose up before me—methought in the very attitude, in which he used of old to address a public assembly—the right arm extended—so—

Shepherd. Few things in this weary warld sae delichtfu' as keepsakes! Nor do they ever to my heart at least, nor to my een, ever lose their tender, their powerfu' charm!

North. How slight, how small, how tiny a memorial saves a beloved friend from oblivion—worn on the finger—

Shepherd. Or close to the heart! Especially if he be dead!" †

A particular day recurring may cause us to think of an event, which happened on the same day in another year; as a marriage, a birth, a death. And, conversely, the event may bring into our thoughts the day of the year. Mr. Whitbread's reply on Lord Melville's trial, by impeachment before the House of Lords, contains this passage: "There are particular circumstances, which lead me to the remembrance of this day (11th of June). There are in the history of every man, however

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* Manfred, A. iii. Sc. 4.

† Wilson's Noctes Ambrosianæ, Vol. II. p. 264, ed. 1855.

obscure, certain *dies notandi.* Some, indeed, bring to the minds of the children the gallant exploits of their ancestors; others have their memory impressed, like myself, by more humble events. Now the 11th of June is to me a *dies notandus.* On the 11th of June my father set up in business; on the 11th of June he annually balanced his accounts; and on the 11th of June his son was required to assist him in this laborious duty. On the 11th of June he knew the progressive increase of his substance, and the generous fruits of his honest industry. On the 11th of June my father died, and the day on which a good man dies is not to be forgotten." *

Time, passing or past, is of itself a fact, and is necessarily a concomitant circumstance of every other fact. If a person sees or hears or does any thing, the time when he sees or hears or does it, he may, or may not, remember. It will be impressed on his mind, if, from any cause, he noticed the time, as by looking at his watch, or hearing a clock strike.

A.'s remembrance of the time, at which B. was at a particular place, C., is often a part of the evidence, which proves that B. was not at that time at another place, D.; which proves, that is, an *alibi.* The other part of the evidence of an *alibi* is, the proof of the distance between the two places, C. and D.; the distance making it impossible for B. to be at D., at the particular time A. remembers B. was at C. †

If T. is charged with committing a murder at a certain pit of water between about 25 minutes after 4

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* Report of the Trial, p. 354.

† If you say I did this on a particular day, but I at that very time was beyond sea, your assertion goes for nothing, as not only I did not do what you say, but I could not by any possibility do it.—*Cic. De Invent.* i. 29.

o'clock and 25 minutes before 5 o'clock on the same morning (within a time consisting of about 10 minutes only), evidence of time and distance to prove an *alibi*, and consequently that T. did not commit the crime, may be, that not later than 25 minutes before 5 o'clock several persons saw T. walking slowly, leisurely, and composedly close to the house of H., and that the distance of the pit of water from the house of H., is 1 mile 7 furlongs and 170 yards.*

If a witness H. says that on the 4th of November, between 7 and 8 in the morning, he was at P., a distance of 12 miles from his own house at B., and that at that time at P. an important conversation took place; evidence to prove an *alibi*, or that H. was not at that time at P., but in bed at his own house, may be, the evidence of J., that between 8 and 9 on the same morning she saw H. in bed at his own house at B.; and evidence to prove another *alibi*, in direct contradiction to that of the witness J., may be, H.'s own evidence that he was not at home till between 9 and 10 on the same morning; that on the same morning he walked from P. to his own house; and the evidence of another witness W., that he on the same morning met H. at W. O. from half-past 8 to 20 minutes before 9, 3 miles and a half from P., and about 8 miles from B. In such a case, J. is called to prove that H. could not have been at P. at the time he alleges the conversation to have taken place. Then again, on the other side, W. is called to show, that J. could not have been correct in the time she states, for that W. met H. on the road at such a time, as would render it absolutely impossible that he could have been in bed at the time J. states.†

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* Ashford *v.* Thornton, 1 Barn. and Ald. 405, 417, 418, 419, 420, 421, 439, 440, 450.

† Frost's Trial (taken by Gurney), Evidence of Hodge, Mary Jones, and Watts, pp. 297, 527, 534, 722, 723, 724.

In most cases, the time when a person sees, or hears, or does any thing is, at the time, quite unnoticed by him, and consequently it is not at all impressed on his mind. In such a case it is not in his memory, and therefore he cannot recollect it. He may, nevertheless, be able to name the time; and if he does, he will do it quite independently of any impression, which the time made on him. He may arrive at it by argument; and in this way name the time with considerable, or even perfect, exactness. He may be able to say on what day or month, or other time, a particular event took place, by knowing that it happened at a marked time, as the anniversary of a birth, marriage, death, or other event.

"*Hamlet.* How long hast thou been a grave-maker?

Clown. Of all the days i' the year, I came to 't that day, that our last king Hamlet overcame Fortinbras.

Hamlet. How long's that since?

Clown. Cannot you tell that? Every fool can tell that: it was that very day, that young Hamlet was born." *

An earthquake made the nurse in "Romeo and Juliet" remember when Juliet was weaned.†

Part of an examination relating to the time of a marriage was in these terms:

"Q. Can you fix what year this was?

A. I believe it to be in the year 1744, but I am certain it was the same year, in which the *Victory* was at *Portsmouth.*

Q. Do you recollect what time of the year it was?

A. In the month of August, I think.

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* Hamlet, A. v. S. 1. † Act i. S. 3.

Q. What is your reason for thinking it was in the month of August?

A. My reason is, that it was in the time of *Maunhill* fair; and also that there were greengages ripe, which the lady and gentleman were both very fond of." *

A written memorandum is a common means of recollection, and to this end is often recommended and made.

"*Lady Macbeth.* Yet here's a spot.

Doctor. Hark, she speaks: I will set down what comes from her, to satisfy my remembrance the more strongly." †

Two great authorities, Gray and Dr. Johnson, offer most judicious advice to travelers, to take notes in writing of what they see, and not to trust to their memory. Gray, in a letter to his friend Mr. Palgrave, who was making a tour in Scotland, desires him to send him some account of "the savage, the rude, and the tremendous" scenes he was making acquaintance with there; and adds,—"It will be the easier task, as you have nothing to do but transcribe your little red books, if they are not rubbed out; for I conclude you have not trusted every thing to memory, which is ten times worse than a lead pencil; half a word fixed upon or near the spot is worth a cart load of recollection. When we trust to the picture, that objects draw of themselves on our mind, we deceive ourselves; without accurate and particular observation, it is but ill-drawn at first, the outlines are soon blurred, the colors every day grow fainter; and at last, when we would produce it to any body, we are forced to supply its de-

* Trial of Duchess of Kingston, folio, p. 110.

† Macbeth, A. v. S. 1.; and see Cymbeline, A. ii. S. 2.

fects with a few strokes of our own imagination. I suppose I have done so myself before now, and misled many a good body, that put their trust in me." *

In Dr. Johnson's "Journey to the Western Islands of Scotland," after speaking of his measuring a cave with a walking pole, and observing that no man should travel unprovided with instruments for taking heights and distances, goes on to say,—"There is yet another cause of error not always easily surmounted, though more dangerous to the veracity of itinerary narratives, than imperfect mensuration. An observer, deeply impressed by any remarkable spectacle, does not suppose that the traces will soon vanish from his mind, and having commonly no great convenience for writing, defers the description to a time of more leisure, and better accommodation. He who has not made the experiment, or who is not accustomed to require rigorous accuracy from himself, will scarcely believe how much a few hours take from certainty of knowledge, and distinctness of imagery; how the succession of objects will be broken, how separate parts will be confused, and how many particular features and discriminations will be compressed and conglobated into one gross and general idea. To this dilatory notation must be imputed the false relations of travelers, where there is no imaginable motive to deceive. They trusted to memory what cannot be trusted safely but to the eye, and told by guess what a few hours before they had known with certainty. Thus it was that Wheeler and Spen described, with irreconcilable contrariety, things which they surveyed together, and which both undoubtedly designed to show as they saw them." †

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* Gray's Works, Vol. II. p. 153, ed. 1807.

† P. 257, ed. Edinb., 1798.

A written memorandum is a transcription of an impression on the mind. The memorandum may be a true transcription of the impression; but if the impression be not a true one of the fact, as words uttered or a deed done, the memorandum will not contain a true representation of the fact. Supposing the fact, intended to be recorded, is words spoken in the hearing of the writer; it is obvious the words may have been wrongly caught by him, and therefore wrongly impressed on his mind; and if so, his memorandum of them will not be a correct representation of the words. Again, allowing the impression to have been rightly made, yet owing to the frail nature of memory, it is probable the only writing, which can be an exact copy of the impression, is, that which is written contemporaneously, or as near as possible in time, with the impression. If the memorandum be not so made, it is likely it will be a more or less exact copy of the impression, in proportion to the time intervening between the impression and the writing.

The memorandum is of value as productive of testimony, when it brings to mind the fact written down; when, on the writer's perusal of it, it causes him to recognize the fact so vividly, that now, his recollection thus aided, he can speak to the fact simply from the original impression on his mind, and quite independently of the memorandum. Supposing the memorandum acknowledges the receipt of money, it may bring to the mind of him, who wrote it, the fact of the receipt of the money.

Sometimes a memorandum will fail to call to mind the fact mentioned in it, and yet be of value as evidence; as, taking the last instance, the memorandum may not recall to the writer's mind the receipt of the money, and yet make him feel sure that he did receive

it; seeing his writing, he says he has no doubt that he received the money; and his so saying is evidence of his receipt of it. But this evidence is plainly independent of remembrance of receiving the money; the writer does not remember it. *

"Where a witness, called to prove the execution of a deed, sees his signature to the attestation, and says that he is therefore sure, that he saw the party execute the deed, that is a sufficient proof of the execution of the deed, though the witness add, that he has no recollection of the fact of the execution of the deed." †

Great care is sometimes necessary, that imagination do not take the place of memory and recollection.

"It is matter of frequent observation, that persons dwelling for a long time on facts, which they believe must have occurred, and trying to remember whether they did so or not, come at last to persuade themselves, that they do actually recollect the occurrence of circumstances, which at first they only begin by believing must have happened. What was originally the result of imagination becomes in time the result of recollection; and the judging of which, and drawing just inferences from which, is rendered much more difficult by the circumstance, that in many cases persons do really, by attentive and careful recollection, recall the memory of facts, which had faded away, and were not, when first questioned, present to the mind of the witness. Thus it is, that a clue given, or a note made at the time, frequently recalls facts, which had passed from the memory of the witness." ‡

The same learned judge, whose words have just

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* See Maugham *v.* Hubbard, 8 Barn. & Cr. 14.

† 8 Barn. & Cr. 16.

‡ By Sir John Romilly, M. R. 16 Beavan, 185.

been quoted, on another occasion made the following observations on the same subject:

"In the examination of the evidence of witnesses, great difficulties of various sorts arise; and one of the difficulties and dangers with which the court has constantly to deal, in examining the evidence of witnesses, who are perfectly honest, and give their evidence perfectly *bonâ fide*, arises from their turning inference into recollection. It frequently happens that a person, by long dwelling on a subject, thinks that a thing may have happened, and he at last comes to believe that it actually did occur. I have, in various cases, had occasion to remark this, especially in cases of pedigree, where persons are endeavoring to recall conversations about relationship, which establish their title. In these cases, it is of great importance to distinguish whether either the recollection tends to the benefit of the witness, or whether he is perfectly indifferent, having no concern whatever in the matter. Undoubtedly, in the cases to which I have alluded, I have frequently found, that, when it was for the interest of the witness, by dwelling long upon the subject, he has come to believe that to have happened which at first he did not remember; that he has turned inference into recollection, and has at last given positive testimony, upon which the court could place no reliance, although, at the same time, willful perjury is not attributable to the witness. But then, on the other hand, this peculiar quality of memory, also, must be borne in mind (which we have frequent opportunities of observing), that a very slight and casual circumstance sometimes awakens recollection in the mind of a witness, who, before that, had forgotten every thing relating to the matter. I have myself seen this on various occasions, and a very strong instance is present to my mind at this moment, where

a perfectly disinterested and respectable witness was asked if he recollected a particular transaction; he had wholly forgotten it; but a diary having been produced and shown to him, in which there was an entry made by himself, in his own handwriting, relating to the subject, he remembered not only the matter itself, but many of the surrounding circumstances, which were proved to be indisputably true by the evidence of the other witnesses, and which, without the production of the book, he would probably never have remembered." *

A person may, from different sources, have two impressions of what another has said. He himself may have heard the words at the time they were uttered; and he may have read a printed report of them. And, in such a case, if he is called upon to give evidence of the words he heard, he may not know from which of the two sources his present impression of them was derived; and being, therefore, unable to say he recollects the words from the impression they made on him when he heard them, it will not be in his power to prove that he heard the words spoken.

"The trial proceeded [a trial in Scotland for sedition, and for having taken and administered unlawful oaths], and it was very soon established that illegal oaths had been administered, and, in all human probability, by the prisoner. But the truth of the particular charge was by no means so clear. This depended on the exact words used. A very slight change of expression could easily soften the character of the oath into mere rashness, or doubt, or even innocence, or aggravate into worse guilt than that charged. . . . . Now, when the prosecutor examined the

* 23 Beavan, 70, 71.

witnesses he chiefly relied on for the precise terms, it came out that they had seen an oath in the newspapers, which was said to have been quoted in the House of Commons, that this was like the one they had been privy to, but that they could not separate their recollection of what they had seen, from their recollection of what they had heard, so that they could not tell whether, in giving evidence, they were doing more than reciting from the newspaper. On this the prosecutor struck." *

When several persons have been present at the same occurrence or transaction, if they afterward, and perhaps at different times, talk among themselves about it, it is very possible, or even likely, that some of them may in time come to think they saw or heard what they did not see or hear, but what others of them say they saw or heard; and thus each one's original story may be much altered, losing something and acquiring something: there being among the talkers, quite unconsciously to themselves, and with perfect honesty and good faith, a liberal interchange of some truths, and, it may be, some fancies.

Many persons have been remarkable for a retentive memory. Of the Greeks and Romans, Cicero † and Quintilian ‡ mention several.

Dr. Johnson, in his Life of Savage, relates of him, that "his apprehension was quick, and his memory so tenacious, that he was frequently observed to know what he had learned from others, in a short time, better than those by whom he was informed; and could frequently recollect incidents, with all their combination of circumstances, which few would have regarded

* Cockburn's Memorials of his Time, p. 335, ed. 1856.

† Acad. Quæst. ii. 1. ‡ Inst. Or. xi. 2.

at the present time, but which the quickness of his apprehension impressed upon him. He had the peculiar felicity, that his attention never deserted him; he was present to every object, and regardful of the most trifling occurrences." *

Mr. Kirby, in his Bridgewater Treatise, thus speaks of the memory of the "lower orders": "With regard to the memory, it is not wonderful that a being, who occupies his time and intellect with few objects, should have a more distinct recollection of certain events, than one whose attention is more divided. It may be observed of the lower orders in general, that their

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* Johnson's Works, Vol. III. p. 364, ed. 1787. [The following anecdote is told of Dr. Abernethy: A gentleman dining with him on a birthday of Mrs. Abernethy's, had composed a long copy of verses on the occasion, which he repeated to the family circle after dinner. "Ah!" said Abernethy, smiling, "that is a good joke now, your pretending to have written those verses." His friend rejoined, that, such as they were, they were entirely his own. "Why," said Abernethy, "I know those verses very well, and could say them by heart," and he repeated them throughout with the greatest apparent ease. The once hearing them read had enabled him to do this.—*Memoirs of Abernethy, p.* 23.

In the case of Palmer *v.* De Witt (5 Abb. Pra. R. N. S. 130), the defendant was charged with infringing a copyright of an acting drama, the defendant alleged that he obtained the play from a person who saw it acted, and carried away in his memory, the words, dresses, and scenery.

Chief Justice Parsons is said to have had an extraordinarily retentive memory for every thing but the names of persons. Justice Parker said of him: "He knew every thing that was in every case in the reports, except the names."

It is related of David Paul Brown, in the biographical notice prefixed to "The Forum," that he defended Judge Porter on his impeachment before the Pennsylvania Senate. The trial had occupied fourteen days, and one hundred and fifteen witnesses had been examined. Mr. Brown had taken notes of the testimony; but on the night preceding the day on which he was to sum up, he ascertained that his notes had been inadvertently carried off by his client, and he therefore, to prepare for the summing up, by an effort of memory, during the night, recalled the order in which the witnesses had been examined, and the matter to which each had testified.]

memory, for the same reason, of matters within their own sphere of comprehension, is often more clear than that of persons better educated and informed." *

It often happens, a thought will temporarily very tenaciously haunt us. We would fain get rid of it, but cannot. Such a remembrance of poor Barbara's song clung to Desdemona on the night she was put to death. †

When things are once fastened in the memory, it may not be in our power ever to get rid of them, if we would. ‡ Is it in our power to choose what we shall remember? When Simonides, or some one else, offered to instruct Themistocles in an art to improve the memory, "I had rather," replied Themistocles, "be taught how to forget. Things I am most unwilling to remember, these I have no power to forget."

On this subject, a letter by Dr. Beattie contains the following anecdote: "One who was on board the *Centurion*, in Lord Anson's voyage, having got some money in that expedition, purchased a small estate about three miles from this town (Aberdeen). I have had several conversations with him on the subject of the voyage, and once asked him whether he had ever read the history of it. He told me he had read all the history, except the description of their sufferings during the run from Cape Horn to Juan Fernandez, which he said were so great, that he durst not recollect, or think of them. §

It sounds well in poetry, that of the life of a man of three score years and ten, there is no day he does

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* Vol. I. p. 85, ed. 1835. † Othello, A. iv. S. 3.

‡ Cicero, De Fin. ii. 32; Acad. Quæst. ii. 1.

§ Life of Dr. Beattie, by Forbes, Vol. II. p. 36, ed. 1806.

not wish to remember; but, in actual life, the desire is probably not common.*

Illness, or old age, often impairs, and sometimes wholly destroys, the power of remembrance.

One effect of the great plague at Athens during the Peloponnesian war was the destruction of memory; some persons forgetting every thing, losing all knowledge even of themselves.† And it is related of the Flight of the Kalmuck Khan and his people from the Russian territories to the frontiers of China, in the year 1771, that the sufferings of these Kalmucks during their march, from fatigue, famine, and slaughter, were so intense, that very many of them lost their memory; all records of their past life were wiped out as with a sponge—utterly erased and canceled. ‡

An injury to the brain by a blow or fall on the head is a common cause of a temporary inability in the person who received it, to give an account of the circumstances under which it took place. Dr. Abercrombie, in his "Inquiries concerning the Intellectual Powers," mentions the following instances of this kind: "A case has been related to me of a boy, who, at the age of four, received a fracture of the skull, for which he underwent the operation of trepan. He was at the time in a state of perfect stupor, and, after his recovery, retained no recollection either of the accident or the operation. At the age of fifteen, during the delirium of a fever, he gave his mother an account of the operation, and the persons who were present at it, with a correct description of their dress, and other minute particulars. He had never been observed to allude to it before, and no means were known by which he could

* Martial, iv. † Thucyd. ii. 49

‡ De Quincey's Miscellanies, Revolt of the Tartars, p. 175, ed. 1854.

have acquired the circumstances which he mentioned." "Some years ago I saw a boy, who had fallen from a wall, and struck his head against a stone which lay at the foot of it. He was carried home in a state of insensibility, from which he soon recovered, but without any recollection of the accident. He felt that his head was hurt, but he had no idea how he had received the injury. After a short time he recollected that he had struck his head against a stone, but had no recollection how he had come to do so. After another interval he recollected that he had been on the top of a wall, and had fallen from it, and struck against the stone, but could not remember where the wall was. After some time longer, he recovered the recollection of all the circumstances."

Dr. Abercrombie also notices the following case of a want of power to recollect the circumstances which preceded and attended an accident: "A young lady, who was present at a late catastrophe in Scotland, in which many people lost their lives by the fall of the gallery of a church, escaped without any injury, but with the complete loss of the recollection of any of the circumstances; and this extended not only to the accident, but to every thing that had occurred to her for a certain time before going to church." *

The effect of old age on the memory is, perhaps, nowhere more strongly depicted, than in Juvenal.†

Except where illness, or old age, or some other cause

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* Part III. S. i. pp. 142, 146, 151, ed. 1832.

† "His loss of members is a heavy curse,
But all his faculties decayed, are worse!
His servants' names he has forgotton quite;
Knows not his friend, who supped with him last night,
Nor ev'n the children he begot and bred."—DRYDEN.
Juv. Sat. x. 322.

has impaired the faculty of memory, it is possible, and often happens, that something we have seen or heard, although many years back and even in childhood, is never forgotten.

"At the time, he [Henry Ashton] was too full of his own appearance, his sword, his laced cloak, his feathered hat, and his managed horse, to pay much regard to any thing else; but he afterward remembered to the hour of his death, that when the hand of his sister, by which she supported herself on the pillion behind him, touched his own, it felt as wet and cold as sepulchral marble." *

"They had the barbarity to make us be in school during summer at 7 in the morning. I once started out of bed, thinking I was too late, and got out of the house unquestioned. On reaching the High School gate, I found it locked, and saw the yards, through the bars, silent and motionless. I withdrew alarmed, and went near the Tron Church to see the clock. It was only about two or three. Not a creature was on the street; not even watchmen, who were of much later introduction. I came home awed, as if I had seen a dead city, and the impression of that hour has never been effaced." †

Things which took place in childhood are often remembered, while others, though they happened later, are quite forgotten:

"*Prospero.* . . . Canst thou remember
A time before we came unto this cell?
I do not think thou canst; for then thou wast not
Quite three years old.
Miranda. Certainly, sir, I can. ‡

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* Bride of Lammermoor.

† Cockburn's Memorials of his Time, p. 8, ed. 1856.

‡ The Tempest, A. i. S. 2.

In old age a person not unfrequently mistakes fancy for reality; he thinks he has in his memory something that never was there, and which has no existence, except in his imagination. This weakness attendant on old age makes it often difficult to ascertain, whether an old person's narrative is founded on reality or on his fancy only. Boswell had been long very desirous of seeing and conversing with Dr. Johnson, and at last they accidentally met, in 1763, at the house of a Mr. Davies. Boswell, in his life of Johnson, has related the particulars of this meeting; and there is likewise an account of it given by Mr. Murphy. On the relation of the latter, Boswell makes these remarks: "Mr. Murphy, in his Essay on the Life and Genius of Dr. Johnson (first published in 1793), has given an account of this meeting considerably different from mine, I am persuaded without any consciousness of error. His memory, at the end of near thirty years, has undoubtedly deceived him, and he supposes himself to have been present at a scene which he has probably heard inaccurately described by others. In my note, *taken on the very day*, in which I am confident I marked every thing material that passed, no mention is made of this gentleman; and I am sure that I should not have omitted one so well known in the literary world. It may easily be imagined, that this my first interview with Dr. Johnson, with all its circumstances, made a strong impression on my mind, and would be registered with peculiar attention." *

It has been supposed by a writer in the Quarterly Review, that many of Lord Eldon's anecdotes were written in advanced age, when the boundary, which

* Life of Dr. Johnson, by Boswell, Vol. II. p. 165, note, ed. 1835; and see several similar instances in the Diary of Henry Crabb Robinson.

separates memory from imagination, was broken down. And the writer goes on to observe,—"Some of them are known to be exceedingly inaccurate, and we have little doubt that, as constantly happens at his time of life, he had confounded things talked of with things done." And the writer adds in a note,—"An instance of this common failing is mentioned by Boswell. An erroneous account of his first introduction to Johnson was published by Arthur Murphy, who asserted that he witnessed it. Boswell appealed to his own strong recollection of so memorable an occasion, and to the narrative he entered in his journal at the time, to show that Murphy's account was quite inaccurate, and that he was *not* present at the scene. This Murphy did not venture to contradict. As Boswell suggested, he had doubtless heard the circumstances repeated, till at the end of thirty years he had come to fancy that he was an actor in them. His good faith was unquestionable; and that he should have been so deluded is a memorable example of the fallibility of testimony, and of the extreme difficulty of arriving at the truth." *

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* Quarterly Review, Vol. CIII. p. 292.

CHAPTER V.

OF RECOGNITION.

RECOGNITION may be of a thing or person; and any one's recognition of either must be based on his original perception of the object he saw, the impression the object made on him, and his retention of the impression.

SECTION I.—Recognition of a Thing.
II.—Recognition of a Person.

SECTION I.

RECOGNITION OF A THING.

A thing is sometimes singular or rare; as either in size, shape, or color, or as the production of a foreign country; and in these cases the singularity or rarity of it may make a deep impression, and this impression retained in the memory may render it easy to recognize the thing.

Often a thing is not singular nor rare, but one of a multitude of other things in most respects like it; as the manufactured goods of particular trades, be they clothing, household furniture, tools of trade or husbandry, or things of any other kind; and in this case, if the particular thing possesses a striking difference, distinguishing it from others of its kind or species, as something wanting or superfluous in it, or some mark purposely made on, or accidentally acquired by it, as a stamp or stain, that difference may be strongly impressed on the mind, and being remembered will much facilitate the power to recognize the particular thing.

Again, as no two things are perfectly alike, there always are between several things some points of difference; in each will be found some peculiarity not seen in any of the others. The thing itself may be very minute, and its peculiarity extremely so, as in the instance of a pea, a bead, or pin. And in a thing of greater size, and even of large bulk, its difference seen by a casual, hasty, or careless observer, may make no impression on him. He sees the thing without noticing its peculiarity, which therefore makes no impression on him. After leaving it he may retain some impression of it, as a whole, as of its size, shape, or color; but having no impression of any peculiar quality in it, he is unable to distinguish it from other things of the same kind, and consequently cannot recognize it. A familiar example of such a thing is the coin in circulation:

"They were all like one another, as half-pence are."*

But small, even nice, points of difference, distinguishing one thing from others of the same kind, may merely by the frequent sight of them, and without any special attention to them, make an impression on the mind. They are component parts of the thing, and go to make up the whole, of which the mind receives an impression. In these cases, the impression is of the general appearance of the thing. This sort of impression is exceedingly common; a workman has it of his tools, and most people have it of their dress and other things they are frequently seeing, handling, or using. It occurs every day, that by remembrance of their general appearance, a carpenter, mason, or other workman recognizes his tools; and dress or other property is known again by its owner.

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* As You Like It, A. iii. S. 2.

Like other things, handwriting may be recognized. A person recognizes a letter which he himself has written, or another person's letter which he has before seen. And then he does it from his previous impression of the very writing recognized. And not only the very same, or identical writing, but also a person's manner or style of writing may be recognized. Almost every body's usual handwriting possesses a peculiarity in it, and distinguishing it from other people's writing. The peculiarity may be extremely nice, and scarcely discernible, but still it is there, and capable of being detected. And not only the writer himself, as A., but another person, B., accustomed to see it, may have in his mind an impression of the writer's usual writing and its peculiarity; in other words, his manner or style of writing. And if a letter or other paper written by A. is presented to B., who has not before seen it, to prove it to be in the handwriting of A., the impression which B. has of A.'s usual writing, and its peculiar character may enable him, not to recognize the very same or identical writing, but to recognize the style of A.'s writing, and express his belief that it is the writing of A. In this case, it is comparison and judgment, which enable B. to give the evidence required. He compares the style of the writing in question with the impression he has before received into his mind of A.'s style of writing, and on that comparison he can come to the conclusion and belief, that the writing in question is in the handwriting of A.

"*Gloster.* You know the character to be your brother's?

Edmund. If the matter were good, my lord, I durst swear it were his; but, in respect of that, I would fain think it were not.

Gloster. It is his.

Edmund. It is his hand, my lord." *

"Hours and hours and hours have I spent in endeavors, altogether fruitless, to trace the writer of the letter that I send, by a minute examination of the character, and never did it strike me till this moment, that your father wrote it. In the style I discover him, in the scoring of the emphatical words—his never-failing practice—in the formation of many of the letters, and in the adieu! at the bottom so plainly, that I could hardly be more convinced had I seen him write it." †

One way to obtain a knowledge of a person's style of handwriting is to see him write, to look over him while he is writing, and observe the manner in which he forms his letters. But this observation of writing is very rarely made. Commonly you see a man in the act of writing, but you do not observe the manner in which he forms his letters; and if evidence of handwriting depended on such observation, it could very seldom be given. But writing can be sufficiently well known in other ways; as for instance, if you have received numerous letters from a person, and you have sufficient reason to believe he himself wrote them. This reason and belief are essential, because one person may, and often does, write letters for another.

A person who comes to recognize another's handwriting, is obviously very liable to fall into error. One, and an abundant source of mistake is, that many persons write very much alike; so much so, that it is often difficult to distinguish one person's hand from that of another.‡

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* King Lear, A. i. S. 2.

† Cowper's Works (Letters), Vol. V. p. 217, ed. 1836.

‡ [One among the many instances that might be cited in corroboration of the text was what occurred in the course of the investigation of the

The circumstance, beside, that few persons constantly keep the very same character of their handwriting, is another fruitful source of mistake. A usual style of signature, or other writing, is frequently much altered by hurry in writing, temporary nervousness, or unsteadiness of the hand, or even by the kind of pen used, quill or steel, or the badness of a pen. And it is common that a person writes different hands at different periods of his life. This may be the effect, not only of increase in age, but of a habit contracted from time to time of writing larger or smaller, of forming letters after a different fashion, or of using abbreviated words, or words differently abbreviated.

Handwriting is very frequently mistaken, either from accidental similarity of style, or designed imitation.*

"No observer of passing events, or reader of newspapers, during the early part of the present [nineteenth] century, will require to be told the history of the ex-judge Robert Johnson, the subject of prosecu-

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charge of forgery against John W. Hunter, in New York. Mr. Hunter was employed in the sub-treasury, and Mr. Cisco, the head of the department was examined as a witness, and swore positively that no person could imitate Mr. Hunter's handwriting so as to deceive him (Cisco), and that he (Cisco) could not be imposed upon in regard to writing with which he was familiar. When he had committed himself beyond all reservation to this positive opinion, he was presented by ex-Judge Pierrepont, the counsel for Mr. Hunter, with a slip of paper with writing on it, and was asked if that was his own handwriting. He replied that it was. His attention was called to the fact that it was somewhat blurred, but he said that made no difference; he recognized it perfectly; it was his own. The counsel then informed the court, that the paper was written by Mr. Levi, a clerk of Mr. Low, in the presence of several eminent witnesses who had attached their mark to it, so as to be able to identify it, and that Mr. Cisco had thus unwittingly testified to another man's handwriting as his own! If he could be so easily deceived in his own handwriting, how much more likely was he to be mistaken in that of another man?]

* See Twelfth Night, A. v.

tion for a seditious libel, under the strange circumstances of his holding, at the time, a seat upon the bench, and of there being absolutely no evidence of his authorship, beyond a sort of general conviction that he was a likely person to do an act of the kind. The article alleged to be libelous was an attack upon Lord Hardwicke, in his capacity of Lord Lieutenant of Ireland. It was published in Cobbett's Register, under the signature of Juverna, and was, in fact, composed by the judge. Nevertheless, the manuscript, although sworn by a Crown-witness to be in Mr. Johnson's handwriting, was actually written by his daughter. This circumstance he might have proved; but as he could not do so without compromising his amanuensis, the jury were obliged to return a verdict of guilty." *

A singular circumstance relating to handwriting happened to Lord Eldon. It is thus mentioned by himself:—"A deed was tried in Westminster Hall, stated to have been executed under circumstances throwing a good deal of blot upon the persons, who had obtained it. The solicitor, who was a very respectable man, said, he felt satisfaction, that there were respectable witnesses. One was the town-clerk of Newcastle, and I was the other. I could undertake to a certainty, that the signature was not mine, having never attested a deed in my life. He looked back to my pleadings, and was sure it was my signature; and, if I had been dead, would have sworn to it conscientiously." †

One person's knowledge of the handwriting of another may be confined to his general style of writing, and may not extend to his signature. A signature may, and very often does, possess a great peculiarity, it may

* Lord Cloncurry's Recollections of his Life and Times, p. 302.

† 8 Vesey, 476.

be, in the form of the letters, or in some flourish, which does not attend the writer's general style of writing. The peculiarity is made use of by some persons from mere whim or caprice, by others from a desire to conceal the writer's usual style, or to make his signature difficult to be imitated. Although, therefore, a person can recognize another's general style, it may not follow that he can recognize his style of signature: this he may never have seen.

On the other hand, a person may be competent to recognize another's style of signature, although quite unable to recognize his general style of writing; for of his style beyond his signature, he may be quite ignorant; and the one may be very different from the other.

It is often the habit of a person to sign his name in his ordinary style of writing, making in his signature no difference in the shape of his letters, or otherwise; and yet in this case, one not acquainted with the other's style of writing, except in his signature, cannot recognize his style in any other writing, as in the body of a letter, unless he assume, or it be conceded that the style in his signature is the style of his usual writing; since his style of signature may very much differ from that of his usual writing. And supposing that assumption or concession to be made, it is obvious that one signature, or a hundred signatures, may lead to mistake, since the number of small letters in the name will be few, and that of capital letters still fewer, compared with the whole number of letters in the alphabet; and a strong probability therefore is, that many letters will be found in the body of the writing, which are not used in the signature to it; and of the writer's style in forming these many other letters the witness has no knowledge.

But, on the contrary, if one is acquainted with the style of another's writing, except his signature, which he has never seen; if that style be in the signature, he can as well recognize it in the signature, as he can in any other words composed of the same letters.

It is probably more often required to recognize a style of signature, than that of any other writing. In a great variety of transactions, the body of a paper is written by one person, and the signature to it by another; as letters on commercial and other business, bills of exchange, promissory notes, contracts, deeds, wills.

The impression which one person has in his mind of another's style of signature, may have been made by his seeing many of his signatures, or even one only. And the impression made by the one alone may, for the purpose of proving the person's signature, be as valuable, be entitled to as much weight, as if the impression were the result of seeing many of his signatures. Circumstances may have caused the impression of the style of the single signature to be very deeply and firmly fixed. Yet in ordinary cases the value of the evidence of a person's style of signature will probably be determined by the number of his signatures, which the witness has seen.

In the above observations on recognition of a style of writing, it is supposed that the impression of the style was purely an incidental and unmeditated consequence of seeing the writing; this consequence happening of itself, without any study of, or looking at, the writing with the design of gaining an impression of the style, and much less for the purpose of recognizing the same style in other writing, intended to be submitted to comparison with it. But cases may arise where a style is inspected and studied

with the very design of gaining an impression of it, and of afterward comparing that impression with the style of other writing. Now in these cases, because the impression is acquired after a different manner, through a different process, through study and design, instead of being purely an incidental and unmeditated consequence of seeing the writing, the two impressions, made in the one way and in the other, may not be equally true and faithful. But who can determine, or how can it be determined, whether they are, or are not equally true and faithful? When an impression is taken designedly with the view to comparison, it will be most satisfactory that the impression be taken by a person skilled in detecting a style in handwriting, and taking an impression of it, by an "expert," as he is called; but even with this precaution, the result of the subsequent comparison may be wrong; and allowing it may be right, a difference of opinion has been expressed on the propriety of admitting, in evidence of handwriting, a comparison with it of an impression taken, although by an expert, for the very purpose of using the comparison in evidence.*

SECTION II.

RECOGNITION OF A PERSON.

With regard to person, when the person of one is distinguished from that of others by something attracting particular notice, as stature, feature, some defect, deformity, blemish, or other thing, natural or accidental, this seen by any one, whether frequently or not, and in some cases even once only, may make such an impression on him, as will enable him long after to re-

* Doe dem. Mudd *v.* Suckermore, 5 Adol. and Ellis, 703.

member it, and through that remembrance to recognize the person.

"Prepared as he was to see an inauspicious and ill-looking person, the ugliness of Anthony Foster considerably exceeded what Tressilian had anticipated. He was of middle stature, built strongly, but so clumsily as to border on deformity, and to give all his motions the ungainly awkwardness of a left-legged and left-handed man. . . . His keen dark eyes were deep set beneath broad and shaggy eyebrows. . . . The features which corresponded with these eyes and this form, were irregular, and marked so as to be indelibly fixed on the mind of him, who had once seen them." *

It is by the face that persons are chiefly known; and no two faces are perfectly alike. Between them there are always some points of difference; and the points of difference in any face, combined with its form, features, and complexion, make up a whole, which constitutes the expression, or countenance of the face. Generally, the face of our most intimate friend, whom we see perhaps daily, is known to us more by its countenance than by the features and other peculiarities, which make up the countenance. And we may have a perfect impression and remembrance of the countenance, although we may be unable to describe, with any degree of exactness, the features and peculiarities which form it?

Every face has its customary countenance, that which it usually wears; and this may last without any observable change for some time; it may so continue for a period in infancy, boyhood, manhood, or old age. Yet by imperceptible degrees, the face and countenance

* Kenilworth, ch. iii.; and see Cymbeline, A. v. S. 5.

are constantly, throughout their existence, undergoing an alteration; and at each successive arrival at boyhood, manhood, and old age, it is found that a change, and a great one, has in the intervening time been made in the face and countenance. So that, when we have known an elderly person from his childhood, we have known him with different faces and countenances.

A countenance is liable to temporary alteration; and it may be said that every face, occasionally, and in transition, wears a different countenance: some passion, as joy, grief, anger, fear, will produce an instantaneous, and often great, alteration in its appearance.

A temporary change may also be artificially caused. The wearing or loss of moustaches or whiskers may have this effect. So may the temporary wearing on the head false hair or a wig. This we learn from the Vicar of Wakefield, and his respectable acquaintance, Mr. Jenkinson: "I could not," says the Vicar, "avoid being surprised at the present youthful change in his aspect; for, at the time I had seen him before, he appeared at least sixty. 'Sir,' answered he, 'you are little acquainted with the world; I had at that time false hair, and have learned the art of counterfeiting every age, from seventeen to seventy.'" *

A lasting alteration of countenance may be occasioned by an accident disfiguring the face, causing an injury to an eye, the nose, or other feature.

Long continued mental distress, or bodily sickness, or hardships, will make sad inroads on a face; quite despoiling it of the countenance it possessed before misfortune arrived. †

A sure innovator on a countenance is Time. Time

* Vicar of Wakefield, ch. xxv.

† See Rogers' Human Life; and Marmion, canto i.

alters the form of features, imparts wrinkles, changes the complexion, whitens and destroys hair.*

"It costs me not much difficulty to suppose that my friends, who were already grown old when I saw them last, are old still; but it costs me a good deal sometimes to think of those, who were at that time young, as being older than they were. Not having been an eye-witness to the change that time has made in them, and my former idea of them not being corrected by observation, it remains the same; my memory presents me with this image unimpaired; and while it retains the resemblance of what they were, forgets that, by this time, the picture may have lost much of its likeness, through the alteration that succeeding years have made in the original." †

If two persons, each between sixty and seventy years of age, were, forty years ago, almost daily together, and intimate friends; but during those forty years have never met, and at the end of that time they happen to meet, a great probability is, they will not at all recognize each other; and if each is convinced of the other's identity, it will not be by their sight, but by their conversation, bringing to each other's mind events or circumstances which took place antecedent to the forty years, and of which each has a remembrance.

When Ulysses returned to Penelope after an absence of twenty years, she did not recognize him; she remembered him only as he was when he left her. And when at length she was convinced he was her husband, it was only by his conversation—by a fact

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* Ovid, Pont. lib. i. el. 4; and Bryant's Poems (The Rivulet), p. 51, Engl. ed. 1850.

† Cowper's Works (Letters), Vol. IV. p. 41, ed. 1836.

he told her of, one that took place before he went away.*

It may happen that a person has not taken a correct impression of another's countenance. If it was seen for an instant only, although by day, or was seen at night, or in twilight, or afar off, or was seen as one in a mass or throng, or by a person of short or otherwise defective sight, or by one intoxicated or affrighted; either of these circumstances—the instant of time, the darkness, the distance, the crowd, the defective sight, the intoxication, the terror—may cause the impression to be defective, and consequently disable the person, having that incorrect impression, from identifying through it the true countenance.

But assuming that one has taken a correct impression of the countenance of another, the former may identify the latter by his countenance. Yet his power to do this will depend on other circumstances, and especially, and in all cases; on these two: one, that the countenance remains the same, or nearly the same, as it was when the impression was taken; and the other, that the impression which was taken is retained.

And supposing the impression taken of a countenance was correct, yet the power to recognize and identify it may be affected by circumstances occurring at the time of exercising the power. For obstacles similar to those, which may originally stand in the way of taking a correct impression, may hinder the recognition of a countenance, in cases where it was

* "The proof consisted in this—that the bed, being attached to the stump of an olive tree still rooted, was immovable; and Ulysses, having made it himself, no person present, he must needs be apprized of the impossibility of her orders, if he were indeed Ulysses; accordingly, this demonstration of his identity satisfies all her scruples."—COWPER. And see Cowper's Homer's Odyssey, Bk. xxiii.

originally correctly taken; as darkness, distance, a crowd, defective sight, intoxication, terror. These, or other, obstacles may wholly destroy the power of recognition of a countenance, and consequently the ability to identify it.

A person may see a countenance, which it is in his power to recognize, and yet he may pass it over without noticing it, unless his attention be particularly directed to it.

"Some, however, demanded of the postillion how he had not recognized Bertram when he saw him some time before at Kippletringan? To which he gave the very natural answer: 'Hout, what was I thinking about Ellangowan then? It was the cry that was rising e'en now that the young laird was found, that put me on finding out the likeness. There was nae missing it ance ane was set to look for 't.'" *

The impression taken once or twice only of a person's voice, gait, or carriage, may sometimes be but of little value for the purpose of identifying him. The voice may not have been in its proper and usual tone, but in one accidental, arising from some passion, as fear or anger; or from bodily ailment, as a cold; or in a tone in imitation of another's voice, or otherwise disguising its own proper and usual tone. So the gait or carriage may not have been the person's usual gait or carriage, but one caused by temporary lameness, or other bodily indisposition, or assumed for the very purpose of disguise.

When persons have been in the habit of seeing another very often, they may be able to recognize him, although in disguise, and even under circumstances of

* Guy Mannering.

sudden noise and confusion, striking terror into their minds.

Rush, the murderer of Mr. Jermy and his son, had a particular way of carrying his shoulders, and he used to keep his head a little on one side. From these peculiarities, and his height, size, and gait, he, with his face covered, and otherwise in disguise, was, at the time of the murders in Stanfield Hall, recognized by four persons, in the midst of repeated discharges of fire arms, and the shrieks, wounds, and death thereby occasioned.*

There is sometimes a mutual recognition of the person between two, although one of them is in disguise. †

A letter in a number of the Spectator contains the following very remarkable instance of the recognition of a schoolfellow:

"Every one who is acquainted with Westminster School, knows that there is a curtain, which used to be drawn across the room, to separate the upper school from the lower. A youth happened, by some mischance, to tear the above-mentioned curtain. The severity of the master was too well known for the criminal to expect any pardon for such a fault; so that the boy, who was of a meek temper, was terrified to death at the thoughts of his appearance; when his friend, who sat next to him, bade him be of good cheer, for that he would take the fault on himself. He kept his word accordingly. As soon as they were grown up to be men, the Civil War broke out, in which our two friends took the opposite sides; one of them followed the Parliament, the other the Royal party. As their tempers were different, the

* The (London) *Times*, March 30, and April 5, 1849.

† See Cowper's Retirement.

youth, who had torn the curtain, endeavored to raise himself on the civil list; and the other, who had borne the blame of it, on the military. The first succeeded so well, that he was in a short time made a judge under the Protector. The other was engaged in the unhappy enterprise of Penruddock and Grove in the West. I suppose, sir, I need not acquaint you with the event of that undertaking. Every one knows that the Royal party was routed, and all the heads of them, among whom was the curtain champion, imprisoned at Exeter. It happened to be his friend's lot at that time to go the Western circuit. The trial of the rebels, as they were then called, was very short, and nothing now remained but to pass sentence on them; when the judge hearing the name of his old friend, and observing his face more attentively, which he had not seen for many years, asked him if he was not formerly a Westminster scholar. By the answer, he was soon convinced that it was his former generous friend; and without saying any thing more at that time, made the best of his way to London, where, employing all his power and interest with the Protector, he saved his friend from the fate of his unhappy associates." *

The countenances of two persons will be much alike when their faces possess similar features and peculiarities, because countenance is the effect of features and peculiarities. Several persons may think the countenances alike; and, if they do, it will be because each has a similar impression of each countenance. But it often happens that two countenances are thought to be alike by one person, but not by another, both seeing them at the same time; the one instantly sees the likeness, the other cannot see any likeness at all. This

* The Spectator, No. 313.

difference must arise from the different impressions, which the countenances make; and the impressions will be different, if both persons have not similar perceptions of the features and peculiarities of the two faces. If the two faces are not seen at the same time, the different opinions as to the resemblance of countenance may arise from the countenances being really unlike each other at different times, one or both of them having in the interim experienced a change.

The likeness of one person to another may cause very great, and most inconvenient, and even fatal mistakes.

Antipholus of Syracuse, the twin brother of Antipholus of Ephesus, experienced some of these inconveniences:

> "There's not a man I meet, but doth salute me
> As if I were their well-acquainted friend;
> And every one doth call me by my name.
> Some tender money to me, some invite me;
> Some other give me thanks for kindnesses;
> Some offer me commodities to buy:
> Even now a tailor call'd me in his shop,
> And show'd me silks that he had bought for me,
> And therewithal, took measure of my body." *

The following is a remarkable instance of resemblance between two sisters: In November, 1794, a woman was indicted at the Old Bailey for robbing her ready-furnished lodgings. The prosecutrix swore to the prisoner's having taken the lodgings. The prisoner said she had a twin sister, so like her that their parents could not distinguish them asunder. A man said the sister was in custody for a similar offense; he had seen her, and they were so alike, it was impossible to perceive any difference. Under these circumstances, the

* Comedy of Errors. A. iv. S. 3, and see Ibid. A. v. S. 1.

jury acquitted the prisoner. She was a second time indicted for a similar offense. The prosecutrix, in this case, was positive as to her identity. She had seen the sister, who, in order to deceive her, had changed clothes with her sister, but still she pointed her out. She also distinguished their voices, and a degree of hastiness in the sister beyond the prisoner. On this second indictment she was found guilty.*

There is probably a greater diversity of intellectual character, than of countenance. And similarity in countenance may be no proof of likeness in intellectual character. Southey having mentioned the observation of the Jesuit Garasse, that he had learnt, "et par la lecture, et par l'expérience, que les hommes sont plus dissemblables en esprit qu'en visage," proceeds to say—"Garasse was right; for there goes far more to the composition of an individual character than of an individual face. Two faces, even though there be no relationship between the parties, may be all but indistinguishably alike, so that the one shall frequently be accosted for the other, yet no parity of character can be inferred from this resemblance. Poor Captain Atkins, who was lost in the *Defence* off the coast of Jutland in 1811, had a double of this kind, that was the torment of his life; for this double was a swindler, who, having discovered the lucky fac-simileship, obtained goods, took up money, and at last married a wife in his name. Once when the real Captain Atkins returned from a distant station, this poor woman, who was awaiting him at Plymouth, put off in a boat, boarded the ship as soon as it came to anchor, and ran to welcome him as her husband." †

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* New Annual Register for 1794.

† The Doctor, vol. vii. p. 474, ed. 1847. [The following case, extracted

Following this story, Southey gives an account, "cut out of a journal of the day," of a coroner's inquest

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from the Bangor *Whig*, a newspaper published in Bangor, Maine, appears also in 1 Western Law Journal, N. S. 471:

"Mr. James Hause, of Corinna, Maine, had a son named Rowland, who left home when young, and was not heard of for many years.

Some months since, a young man named Luther Hause, a native of Troy, went to Bangor, Maine, and, while there, some neighbors of James Hause saw him, fancied he was the missing Rowland Hause, and accosted him by that name. The young man informed them of their mistake, and avowed his real name. They did not believe him, and informed Mr. James Hause that they had seen his son. Mr. Hause went immediately to Bangor to find him, was unsuccessful in his search, and left a neighbor authorized to bring him home. The latter found Luther, and, on inviting him to go home, Luther accepted the invitation. When he reached the house he addressed Mr. and Mrs. Hause as father and mother. Mrs. Hause had some doubts at first, as the color of the eyes and hair of Luther was entirely different from that of her son. She referred to several scars her son had. Luther showed a scar on his knee, one on his breast, one on his neck, and an overlapping toe, all of which Rowland had.

He remained at their house some five months, and the longer he stayed the more they were satisfied he was their son. Mr. Hause stated that he believed him to be his son just as much as he believed his wife to be his wife. Many domestic circumstances were related by the young man which they supposed could only have been known to their son, but which the impostor had probably derived from themselves in the relation of family matters, and afterward brought forward as a confirmation of his identity. Several of the neighbors of Mr. Hause took this young man to be Rowland Hause. Young men who had been schoolmates with Rowland, talked with Luther about past times, and became convinced that he was Rowland Hause.

At last, a Mr. Dow came to Corinna, saw Luther, and said that he knew this young man, and his name was Luther Hause and no mistake, and that he belonged in Troy. Another person recognized him as Luther Hause, and said he had lived by him seventeen years. James Hause then began to doubt the fact of Luther Hause being his son; and in order to settle the dispute existing in the family and the community, as to his identity, a warrant was issued by Volney A. Sprague, Esq, against Luther, for obtaining goods under false pretenses, as he had got a watch, and several other articles, while remaining at Mr. Hause's house. He was arrested and examined. Mr. Seth Hause, of Troy, was summoned, and appeared at the trial, and there recognized the prisoner as his son.

During the trial there was great excitement, and about four hundred persons were present, and apparently the mass of them in favor of Luther,

on the body of a girl found drowned, between whom and another young woman living there was a likeness

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believing him to be Rowland. The justice sustained the warrant. Upon the trial, the counsel of the prisoner contended that Hause and his family had deceived the young man, instead of his deceiving them; that when he was first seen in Bangor, he stated distinctly that his name was Luther Hause; that they dragged him to Corinna, and forced him to say that he was Rowland Hause; there was no pretense that he was any one else than Luther Hause; and that James Hause, if he had opened his eyes to the light around him, might have known that he was Luther Hause. The judge charged very strongly against the prisoner. The jury, after being out a very few minutes, came into court with a verdict of guilty."

A most remarkable case of mistaken identity is shown in the trial of Joseph Parker, for bigamy, in New York, in 1804. The trial is reported in Edwards' Juryman's Guide, in the 2d volume of the American Magazine of Wonders, and in the New York City Hall Recorder. See, also, as to mistaken identity, the 2d volume of Household Words, p. 102. The following case, being beyond all question authentic, we extract from a New York paper, and deem worthy insertion here:

"On the 9th inst., the police found at 132 Cherry street, and conveyed to the Morgue, the body of an unknown woman, who was supposed to have been murdered. Her skull was fractured as if by a blunt instrument.

Ellen Davis, 241 West Fourteenth street, called at the Morgue the day after the body of the woman was sent there, and identified it as that of her mother, Anna McCaffrey, and on the next day, her sister, the other daughter, Kate McKeon, 247 Avenue B, called, and also identified the body. On the day of the funeral, Monday last, a number of the friends of the late Mrs. McCaffrey looked at the corpse in company with the two women named, and recognizing the features bade it a last adieu. The circumstance of the murder brought a large concourse to the funeral, which was quite imposing. The relatives went home afterward to mourn, and the friends to speculate on the shortness of life and the frequency of mysterious murders. It was an exciting topic, and was not exhausted until the next day, when to the astonishment of all, Mrs. McCaffrey walked into the house where her daughters were, tartly inquired what they were 'blubbering about.'

The living Mrs. McCaffrey, it appears, was expected on a visit, from Providence, R. I., to her daughters in this city about the time they heard of the body awaiting identification at the Morgue; but she delayed her visit a few days, and in the mean time her daughters gave decent burial to a poor unfortunate."

The following is abridged from the *Home Journal:*

"In the year 1850, I was one day watching, from the window of my hotel, in Brooklyn, the operation of elevating a 'Liberty Pole' in the

so extraordinary, that a number of witnesses, among whom was the mother of the latter, swore positively to the body as that of the girl living. Toward the close of the inquest, however, the girl so supposed to be dead walked into the room, and said to one of the most positive of the witnesses, "How could you make such a mistake as to take another body for mine?" The

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square beneath. A crowd had assembled on the occasion. Some of the ropes parted, and a section of the shaft fell heavily to the ground. One of the by-standers, an elderly man of the humbler class, received a blow upon the head, which produced instant death. The body was removed to the door-step beneath my window, and the unfortunate man was at once recognized by several of his neighbors who chanced to be present. The coroner was in the immediate vicinity, and was soon brought to the spot, when, the case being clearly one of accidental death, the formality of an inquest was shortly concluded, and the body delivered to the friends of the deceased, who removed it to his late residence. I attended the inquest which was held in an adjacent room, and heard distinctly the testimony which identified the corpse, no less than five or six witnesses declaring that they were immediate neighbors of the deceased, whom they unhesitatingly recognized.

The affair produced no other impressions than those natural on witnessing such a sad occurrence, and might have passed into oblivion, had I not, the next morning, heard the sequel, and subsequently satisfied myself, by personal investigation, of the accuracy of the details. They were briefly as follows: The corpse was conveyed to the house of the deceased, and met at the door by the widow, who embraced it in an agony of distress, and indulging in those extravagant demonstrations so common in women of her class. She was finally induced to retire to her apartment. The body was deposited in an adjoining chamber, and the by-standers gradually dispersed. A few hours after, the woman's husband returned home.

The explanation is very simple. The deceased proved to be an entire stranger. The personal resemblance between the two men was very strong, and their garments also similar. In the horror of the moment, the recognition by the neighbors was not surprising, while the wife had been already apprised, by a messenger, of the fatal event, was prepared to receive her husband's corpse, and did not stop to scrutinize closely the familiar features, but, the first burst of grief over, turned away to indulge her agony, leaving to others the task of disrobing the corpse. Perhaps a subsequent examination of the clothing might have led to a discovery of the error."]

result was, there was no evidence to prove who the deceased was.

When one at the same time takes an impression of a person, and of the dress he is then wearing, a recollection of the dress may be an auxiliary power to identify the person; yet it is obvious that this identification ought mainly to rest on the remembrance of the person, independently of the dress; for the dress, of which the impression was taken, may have many likenesses; as, for instance, soldiers' uniform, laborers' frocks; and the dress supposed to be the one remembered, and used to identify it, may be one of those likenesses; and in proportion to their number will be the danger of mistaken identity of person. And besides, admitting the dress to be rightly identified, it does not follow that the person who wore it, when the impression of it was taken, is the man who owns and now wears it, and whose identity is in question; for it might have been lent by him, or stolen from him, and by one of these, or some other, means have clothed another person, when the impression of the dress was taken.

Dress is sometimes more noticed than the person is, who is wearing it, especially if the observer's daily occupation is connected with dress:—

"'May I ask her appearance, sir?' said Tressilian.

'O, sir,' replied Master Goldthred, 'I promise you she was in gentlewoman's attire—a very quaint and pleasing dress, that might have served the Queen herself: for she had a forepart with body and sleeves, of ginger-colored satin, lined with murrey taffeta, and laid down and guarded with two broad laces of gold and silver. And her hat, sir, was truly the best fashioned thing that I have seen, being of tawny taffeta, embroidered with scorpions of Venice gold, and having a

border garnished with gold fringe. Touching her skirts, they were in the old pass-devant fashion.'

'I did not ask you of her attire, sir,' said Tressilian, 'but of her complexion—the color of her hair, her features.'

'Touching her complexion,' answered the mercer, 'I am not so special certain; but I marked that her fan had an ivory handle, curiously inlaid;—and then again, as to the color of her hair, why, I can warrant, be its hue what it might, that she wore above it a net of green silk, parcel twisted with gold.'

'A most mercer-like memory,' said Lambourne; 'the gentleman asks him of the lady's beauty, and he talks of her fine clothes!'" *

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* Kenilworth, ch. ii.

CHAPTER VI.

OF CERTAIN FACTS COMMON IN EVIDENCE.

SECTION I.—Of Length of Time.
II.—Of Speed.
III.—Of Distance of Place.
IV.—Of Falsehood.
V.—Of Self-conviction.
VI.—Of Character.

SECTION I.

OF LENGTH OF TIME.

When a person speaks to the length of time which was consumed in doing something, whether by the speaker, or some one else, it may happen that the time was known, and is remembered, by having at the time looked at a watch, or heard a clock strike. "I grant you I was down, and out of breath; and so was he; but we rose both at an instant, and fought a long hour by Shrewsbury clock."*

So if from any cause length of time is, purposely to know it, marked from beginning to end; to ascertain, for instance, how long a person is speaking, or is passing from one place to another by walking, running, or riding; in such cases, the length of time is impressed on the mind, and is, therefore, commonly and easily remembered. But where there is not a particular object in marking length of time, it commonly happens that a person who himself does any thing, or observes another doing it, does not in the progress of the act or

* Henry IV. Part I. A. v. S. 4.

work, nor at its completion, note the length of time so employed. In such a case, the time while passing on, or when completed, does not leave any impression, and consequently cannot be in the memory, or be remembered. In a case of this kind, if a person undertakes to speak to the length of time, what he says will not be from memory; it may be from argument in his own mind, that the thing done did probably take the length of time he speaks to:

"*Hamlet.* . . . Stay'd it long?
Horatio. While one with moderate haste might tell a hundred." *

In these cases, where length of time is founded on probability only, there is necessarily some uncertainty about the exact length. For what in one person's mind might be an hour, might in another's be half an hour, or an hour and an half. And it is besides well known that few persons have a just notion of the length of a small space of time. "It has been truly observed," said Chief Baron Macdonald on an important trial, "that there is nothing we are so little in the habit of as measuring, with any degree of correctness, small portions of time. I am persuaded that, if any one were to examine with a watch, which marks the seconds, how much longer a space of time a few seconds, or a few minutes, really are, than people in general conceive them to be, they would be surprised; but, in general, when we speak of a minute, two minutes, or an instant, we can hardly be understood to mean more than that it was a very short space of time." †

Great mental trouble or anxiety may make past time to appear much longer than it really was. Pepys

* Hamlet, A. i. S. 2; and see *ante*, page 45.
† Trial of Patch (taken by Gurney), p. 171.

enters in his diary, Wednesday, 5th September, 1666, in the midst of the fire of London, which began on Sunday morning, the 2d, "It is a strange thing to see how long this time did look since Sunday, having been always full of variety of actions, and little sleep, that it looked like a week or more, and I had forgot almost the day of the week." Sir Augustus Frazer, in a letter written by him on the 22d of June, 1815, after the Battle of Waterloo, which was [terminated] on the 18th, says, "How misery prolongs time! It already seems an age since we were at Brussels; the very day of the 18th seems an age ago." * It was no doubt the anguish of mind of Don Quixote's housekeeper, through her fancied mischances befallen her master, that made her exclaim, on his first return home after an absence of only *two days and a night*, that neither he, nor his horse, nor his arms had been seen for *six* days. †

Length of time is often very important in evidence, as a measure by which to judge of the possibility, or probability, of doing something said to have been accomplished. ‡

SECTION II.

OF SPEED.

As a matter of evidence, it is frequently of consequence to know the speed with which a person was riding or driving at a particular time. Accidents are every day occurring from fast riding or driving: a child is run over, a carriage is overturned. In these cases, few spectators, perhaps, will be able to say, with even

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* Letters of Sir A. Frazer, p. 565. † Don Quixote, Part I. ch. v.

‡ It is often important to measure a transaction by time, and to see whether one of such magnitude, or containing so many things, could be accomplished within it.—*Cic. De Invent.* i. 26.

tolerable accuracy, the rate of speed at which the person who caused the accident was going. To do this satisfactorily requires a former attention to speed, with a view to determine the rate of it: and from that attention, an experience, grown into a habit, to settle a rate of speed on any particular occasion. "I could not but observe with alarm the quickened motion of our horses. Ten years' experience had made my eye learned in the valuing of motion; and I saw that we were now running thirteen miles an hour."*

Dr. Henry, speaking of the Britons, Gauls, and Germans, tells us, on the authority of Cæsar † and Tacitus, ‡ "It was a common practice among all these nations to mix an equal number of their swiftest footmen with their cavalry; each footman holding by a horse's mane, and keeping pace with him in all his motions." And he adds, "This way of fighting continued so long among the genuine posterity of the Caledonians, that it was practiced by the Highlanders in the Scots' army in the civil wars of the last [seventeenth] century." § Neither Cæsar nor Tacitus mentions the swiftness, or the size, of the horses—important points in judging of the activity and speed of the men.

The annals of the "Sporting World" doubtless furnish remarkable instances of man's swiftness of foot; but, as a fact in common evidence, it is not the extraordinary feat of a pedestrian that requires attention, but the ordinary pace of a man in walking or running, and, especially, the ability of the individual, whose

* The English Mail Coach, De Quincey's Miscellanies, p. 336, ed. 1854.

† De Bel. Gal. i. 39. ‡ Germ. vi.

§ Henry, Hist. B. I. ch.

speed on a particular occasion it may be important to know.

Speed is greatly governed by the nature of the ground passed over, being accelerated or retarded by the evenness, or roughness, of it, and by its form of plain or hill. So obstructions of any kind in the way, whether constant or casual, may hinder, and, on the other hand, freedom from them may assist, the rate of speed.

The greatest impulse to speed is given by the motive for it. If the word goes forth, "Escape for thy life; look not behind thee,"—the utmost attainable swiftness may be expected as the result. When the malefactor, thief, or murderer, meditates an *alibi*, and, escaping from the scene of his crime, thinks, if he says not, "Would I were safe at home in bed!" * no strain on his muscular powers is spared to mend and keep up his pace.

In Scotland, in former days, swiftness of foot was sometimes put to a severe trial, when a Highland chief summoned his clansmen to a rendezvous by sending out the "*Fiery Cross*":

"Then Roderick, with impatient look,
From Brian's hand the symbol took:
'Speed, Malise, speed!' he said, and gave
The crosslet to his henchman brave;
'The muster place be Lanrick mead—
Instant the time—speed, Malise, speed!'

. . . . . .
. . . . . .

Herald of battle, fate, and fear,
Stretch onward in thy fleet career!
The wounded hind thou track'st not now,
Pursuest not maid through greenwood bough,
Nor pliest thou now thy flying pace,
With rivals in the mountain's race;

* Gay.

> But danger, death, and warrior-deed,
> Are in thy course—speed, Malise, speed!" *

On the subject of these verses, Sir Walter Scott, among the notes to the same poem, says, "When a chieftain designed to summon his clan, upon any sudden or important emergency, he slew a goat, and making a cross of any light wood, seared its extremities in the fire, and extinguished them in the blood of the animal. This was called the *Fiery Cross*, or the *Cross of Shame*, because disobedience to what the symbol implied inferred infamy. It was delivered to a swift and trusty messenger, who ran full speed with it to the next hamlet, where he presented it to the principal person, with a single word, implying the place of rendezvous. He who received the symbol was bound to send it forward, with equal dispatch, to the next village; and thus it passed with incredible celerity through all the district which owed allegiance to the chief, and also among his allies and neighbors, if the danger was common to them. At sight of the Fiery Cross, every man, from sixteen years old to sixty, capable of bearing arms, was obliged instantly to repair, in his best arms and accouterments, to the place of rendezvous. He who failed to appear, suffered the extremities of fire and sword, which were emblematically denounced to the disobedient, by the bloody and burnt marks upon this warlike signal. During the civil war of 1745–6, the Fiery Cross often made its circuit; and upon one occasion it passed through the whole district of Breadalbane, a tract of thirty-two miles, in three hours."

On a pressing necessity, a horseman may, in Shakspeare's strong expression, *devour* the way:

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* The Lady of the Lake, canto iii.

"After him came, spurring hard,
A gentleman almost forespent with speed,
. . . . .
He seem'd in running to devour the way,
Staying no longer question." *

SECTION III.

OF DISTANCE OF PLACE.

The distance of one place from another is often a material fact in evidence. If a person does not know what the distance is by measure, he may take it from common report,—from what it is called:

"How far is't call'd to Fores?" † .

Or he may take it from some kind of argument in his own mind about it. He may know that to walk from the one place A. to the other B. takes him such a time; and that he consumes the same time in walking from some other place C. to another D., the distance between which he knows. Then, supposing the two paths or roads to be alike, as both level or both hilly, and both to be free from obstruction, or neither to possess an obstruction which the other does not, in such a case, the time spent in the walk may lead him to conclude the distance between A. and B. to be the same as that between C. and D.

Common report may be a very unsafe guide. Dr. Johnson thus speaks of the dimensions of the Island of Raasay, and others of the Hebrides: "The length of Raasay is, by computation, 15 miles, and the breadth two. These countries have never been measured, and the computation by miles is negligent and arbitrary. We observed in traveling, that the nominal and real

* Henry IV. Part ii. A. i. S. 1. † Macbeth, A. i. S. 3.

distance of places had very little relation to each other," *

The occupation of some persons may make them more fit than others to determine distances, without measuring; as surveyors of roads, and land-surveyors. And many persons can, from experience, pretty accurately tell short distances without measuring. But this is not the case with all; for some are much puzzled to determine even very short distances. An obvious and common method to learn from them the distance of one spot from another, as from A. to B., is to compare distances,—to propose to them a certain distance, which they know, or see; as the length of a particular street, or building, or room, and inquire if this distance corresponds with the distance from A. to B.

There may be different distances between one place and another; judging by the different ways, which may be used between them. There is distance in a straight line, "as the crow flies;" and distance by this or that path or road. And in these cases, the time required to pass from the one place to the other may vary with the distances, and the obstructions to be overcome. The measured distance from a pit of water round by E., to the farm-house of H., is 2 miles and 4 furlongs. A second, and the most ready and accessible, way from the pit to the farm-house, and also the way which could be gone over in the shortest possible time by any person traveling the same on foot, is from the pit across certain fields into the C. turnpike road, and so across the road and other fields into and along a lane leading by the house of L., and so along another lane to the farm-house of H. But the distance from

* Journey to the Western Islands of Scotland, p. 100, ed. Edinb. 1798.

the pit of water to the farm-house of H., measured in the direction of the last way, is 1 mile 7 furlongs and 170 yards. A third, and the shortest way, is that in a straight line. And the measured distance from the pit of water in a straight line to the farm-house of H., is 1 mile 4 furlongs and 60 yards; but there is no foot-path or other way in this direction, except for the distance of about 100 yards, being from a bridge across a canal to the farm-house; and from the intersections of hedges and fences of inclosures lying between the pit of water and the bridge, and the difficulties of the ground, it would require a longer time to arrive at the farm-house by this course of the straight line, than by taking the more circuitous and accessible course secondly pointed out.*

The peculiar knowledge, which an Irish peasant has of distances, is thus mentioned by Sir Jonah Barrington: "I have often heard it remarked and complained of by travelers and strangers, that they never could get a true answer from any Irish peasant as to *distances*, when on a journey. For many years I myself thought it most unaccountable. If you meet a peasant on your journey, and ask him how far, for instance, to Ballinrobe? he will probably say it is '*three short* miles.' You travel on, and are informed by the next peasant you meet, that 'it is *five long* miles.' On you go, and the next will tell 'your honor' it is *four* miles, or about that same. The fourth will swear, 'if your honor stops at *three* miles, you'll never get there.' But on pointing to a town just before you, and inquiring what place that is, he replies, 'Oh! plaze your honor, that's Ballinrobe, sure enough!' 'Why, you said it was more than three miles off!' 'Oh yes! to be sure

* Ashford *v.* Thornton, 1 Barn. & Ald. 420, 421, 440.

and sartain, that's from *my own cabin*, plaze yer honor. We're no scholards in this country. Arrah! how can we tell any distance, plaze your honor, but from *our own little cabins?* Nobody but the schoolmaster knows that, plaze your honor.' Thus is the mystery unraveled. When you ask any peasant the distance of the place you require, he never computes it from where you *then are*, but from *his own cabin;* so that if you asked twenty, in all probability you would have as many different answers, and not one of them correct." *

SECTION IV.

OF FALSEHOOD.

A falsehood is a common subterfuge of guilt. "I know not," said Cain, when Cain *did* know: so early do we read of the sin of lying, as a consequence of crime. It is the readiest instrument at hand to parry suspicion with, and it is usually supported by a bold front.†

The guilty man will affirm or deny, as he thinks will suit his purpose. He will deny he is the person who, at such a time, was at such a place, and will affirm he was then elsewhere. He will deny that a particular thing, proved to belong to him, is his property. But when an accused person tells a falsehood, then, as to the particular thing he falsely affirms or denies, that particular thing, according to the circumstances, may, or may not, hurt him. If he denies that, at such a time, he was at such a place, the proof that he was then there may, or may not, hurt him; or if he denies that a particular thing is his property, the proof

* Sir Jonah Barrington's Personal Sketches, Vol. I. p. 151.

† Juvenal, Sat. xiii. 75.

that it is his property may, or may not, hurt him. Either proof will, or will not, injure him, according as the fact proved is consistent or inconsistent with innocence. But in either case the falsehood tends to prejudice him. For experience teaches, that commonly, in matters of moment, a lie is not uttered without a sufficient motive; and therefore from the lie a just inference is, there was a motive for it; and, allowing a motive, it is not unreasonable to conclude it sprang from a consciousness of guilt. And in this way the falsehood becomes a fact, that is evidence against the accused; and, put into the scale against him, must have its due weight allotted to it.

SECTION V.

OF SELF-CONVICTION.

Words unwarily dropped may speak guilt, and lead to conviction of it.* On this subject, Sir Walter Scott has the following note to a passage in Rokeby:† "All who are conversant with the administration of criminal justice must remember many

* "The self-convicted felon dies."—GAY. Many men, through imprudence in talking, have fallen into trouble; as lately happened to Stajenus. While talking of certain matters, he was overheard by persons, who were listening on the other side of the wall between them; and on their evidence he was condemned to death. A similar circumstance is related of Pausanias, the Lacedæmonian.—*Cic., Topica*, 20. [The poet Ibycus, journeying to Corinth, was assailed by robbers; as he fell beneath their murderous strokes, he looked around if any witnesses or avengers were nigh. No living thing was in sight save a flight of cranes high overhead. He called on them, and to them committed the avenging of his blood. Long after, his murderers, setting in the open theatre at Corinth, beheld a flight of cranes hovering above them, and one said scoffingly to another, "Lo there, the avengers of Ibycus!" The words were caught up by some near them, and they, being questioned, betrayed themselves, and were executed. The Cranes of Ibycus passed into a proverb.—*Trench, Lessons in Proverbs.*]

† Rokeby, canto ii.

occasions in which malefactors appear to have conducted themselves with a species of infatuation, either by making unnecessary confidences respecting their guilt, or by sudden and involuntary allusions to circumstances, by which it could not fail to be exposed. A remarkable instance occurred in the celebrated case of Eugene Aram."

Self-conviction may be by deed, as well as word; by some inadvertent act done. Shakspeare attributes Cardinal Wolsey's fall in a great degree to some papers, which he carelessly put into a packet for the king.*

Dr. Johnson, in his journey to the Hebrides, gives (p. 124) this account of the discovery of a conspiracy formed by Hugh Macdonald, who was next heir to the dignity and fortune of his chief. Hugh, being so near his wish, was impatient of delay, and had art and influence sufficient to engage several gentlemen in a plot against the laird's life. Something must be stipulated on both sides, for they would not dip their hands in blood merely for Hugh's advancement. The compact was formally written, signed by the conspirators, and placed in the hands of one Macleod. It happened that Macleod had sold some cattle to a drover, who, not having ready money, gave him a bond for payment. The debt was discharged, and the bond redemanded; which Macleod, who could not read, intending to put into his hands, gave him the conspiracy. The drover, when he had read the paper, delivered it privately to Macdonald, who, being thus informed of his danger, called his friends together, and provided for his safety.

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* Henry VIII. A. iii. S. 2.

SECTION VI.

OF CHARACTER.

On a criminal trial, it is common for the person accused to bring witnesses to speak to his character; in which case the testimony of character is part of the evidence, on which the conclusion of guilty or not guilty is arrived at. The object of it is to exculpate the accused, to cause him to be acquitted.

This kind of testimony presupposes that there is some evidence against the accused, tending to prove that he is guilty; for otherwise, testimony of exculpation would not be needed. Character is useful in doubtful cases. If on the rest of the evidence there is a doubt whether the accused is guilty, then evidence of character ought to have its proper weight, and may have, and often has, the effect to turn the scale in favor of innocence.

The nature of evidence to character is, that it is the witness's inference and opinion only; inference and opinion drawn from facts. The facts may be, what the witness has heard the accused person say, or what he has seen him do; or his general conduct, which has come under the witness's own personal observation.

An opinion of character amounts to probability only; it cannot be set higher than this. From such and such facts, the inference is, not that it is certain, demonstrable, that the moral nature of the accused, at the time of the imputed offense, was such that he could not commit it, but that it is not probable he would commit it.*

* [The doubtful value of testimonials to character, is exhibited in the following account abstracted from 1 Albany Law Journal, 60: A man, called Goodwin, was convicted, on the clearest testimony, of an indecent assault. A police officer stated the prisoner to have been known to him

The weight of the opinion must be in a great degree governed by the opposite natures of the character and offense. If the charge be of fraud, or theft, the character should be of honesty; if of perjury, of respect for an oath; if of homicide, of gentleness of disposition; if of treason, of loyalty. The witness may infer it is not probable the honest man would be guilty of fraud or theft; nor he who respects an oath, of perjury; nor the man of gentle disposition, of homicide; nor the loyal man, of treason.

On the trial, in 1840, of Frost for high treason, by levying war against the Queen, the Chief Justice Tindal, in his summing up, explained to the jury the general nature of the evidence of character, and the jury's duty with regard to it. One of the witnesses for the prisoner had said, he had frequently heard Frost make speeches in public, and he had always heard him speak in favor of peaceable behavior, and against force. After noticing this evidence, the Chief Justice continued: "Several other witnesses give their testimony to the same effect as to the character of Mr. Frost. That is matter for your consideration, when you are deter-

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for many years, as one of a gang addicted to such practices. On this he was sentenced to seven years penal servitude. Afterward an application was made to suspend the execution of the sentence to enable the convict to produce testimony, showing the police officer to have made a mistake as to the convict's previous character and habits. This was granted, and several witnesses of undoubted respectability were examined, who stated they had known the prisoner for some years, and that his conduct, so far as they could judge, was decent; and a clergyman of distinction wrote the judge, that he had had the prisoner under his eye for a long time, and that the prisoner's behavior had always been praiseworthy. This testimony was met with overwhelming proof, that whatever might be the prisoner's character by day, at night he was the kind of person the officer described him. May not this kind of transformation, says the writer, account for many contradictions between reputation and fact? and may not the respectability of noon be a mask for the rascality of night?]

mining whether or not the prisoner is guilty of the charge, which is now imputed to him. It is by no means decisive in his favor; but it is a fact, which you are to weigh, when you are giving effect to the testimony brought on the side of the prosecution. The nature of evidence given to character is, to show that the prisoner, who is of a peaceable disposition, and averse from mixing himself up in such quarrels and affrays and tumults, as are now laid to his charge, is not a person likely to be guilty of the crime of high treason, by levying war against the Queen. It is, however, only for your discretion to give the weight that is due to it. The general character of a man will make it very often improbable that he should commit a particular crime that is imputed against him. A man, who has a general character for honesty, is not likely to commit a theft. A man, who has a peaceable and well-disposed character, and recommends to others peace, upon occasions of general disturbance, is not likely to be a person who would commit an act of violence, by levying war. But it is, at best, no more than a question of probability, to be put in opposition and weighed against the evidence of the fact. If the evidence, which goes to the fact, is sufficiently strong to convince you that the act of criminality, which is imputed to him, was actually committed, then it is no more than weighing probability against fact. If the scales are hanging even, and you feel a doubt whether the party is guilty or not of the act charged against him, then undoubtedly you will give him the full benefit of such testimony of general character, which he may have earned by his previous conduct in life. You are to weigh it, not as direct evidence in the case—not as positive evidence contradicting any that has been brought on the other side—but as testimony, probably, to induce you to doubt, whether

the other evidence is correct, and not to discard that evidence, if you think that it is so." *

It ought to appear from the witness's evidence, that he has had full opportunities of knowing well the character to which he takes upon himself to speak. And, moreover, his mental power rightly to infer the character he gives ought, perhaps, in some degree, to appear from his evidence; but probably this power is usually more assumed, than proved. And to judge of the weight of evidence to character, it should not altogether be lost sight of, that the witness is called by the person accused, and purposely to bear favorable testimony; and therefore from amongst relations, friends, or other persons kindly disposed toward him. And from this circumstance it should not be forgotten, that friendly bias or influence may rule or bend the mind of the witness, and consequently give to his evidence undue color or strength.

The time when the witness drew his inference of character is very material. The nearer it comes to the time of the imputed offense the better. In effect, what the witness says is, he thinks that, at such a time, the accused would not commit the offense imputed to him. Many crimes, no doubt, take place through a man's vicious propensity to them; when they are committed usually with forethought, and often habitually, or as a part of the business of life. Among offenses of this description, stealing is prominent. But a knowledge of mankind, and constant experience in the world, teaches that frequently crime depends very much on temptation; so that, where there is no temptation, there is no crime; but let temptation come in the way, it is not withstood, and crime is the result:—temptation, it may

* Trial of Frost (taken by Gurney), p. 749.

be, by others, but more commonly, perhaps, of this kind—when a man "is drawn away of his own lust and enticed." Temptation, to be effectual, must correspond with the present desire of him who is tempted. Want of food or raiment may tempt a man, destitute of these necessaries of life, to steal. The bait must be suited to the prey; and if it is not, it will fail. What may be a strong temptation to one man, may be none at all to another.*

And, again, the same thing that, in a former period of a man's life, or in the last year or month of it, or even yesterday, might have strongly tempted him, may over the same man now have no power whatever. Age, health, moral improvement, and a variety of other causes, may occasion this difference in the force of temptation.

And, on the other hand, what will now tempt a man, and lead him into crime, might not have had this power at an earlier period of his life. Or, guilty now, he may have lived innocent through former years, merely because temptation did not then come in his way.†

The above considerations show the importance of the time of which a witness to character speaks. And, in fact, the witness is constantly cross-examined on the article of time. And the effect of this cross-examination may be wholly to destroy the witness's evidence in chief. On the trial of Colonel Despard, in 1803, for high treason, Lord Nelson was called as a witness to his character. And, speaking of a particular time during which they had served together, Lord Nelson said: "In all that period of time, no man could have shown more zealous attachment to his sovereign and

* See Paradise Regained, B'k ii. † Henry V. Act ii. S. 3.

his country than Colonel Despard did. I formed the highest opinion of him at that time, as a man and an officer, seeing him so willing in the service of his sovereign." Lord Nelson was then cross-examined; the whole of this examination consisting of the three following questions and answers:

"Q. What your lordship has been stating was in the years 1779 and 1780?

A. Yes.

Q. Have you had much intercourse with Colonel Despard since that time?

A. I have never seen him since the 29th of April, 1780.

Q. Then as to his loyalty for the last twenty-three years of his life, your lordship knows nothing.

A. Nothing."*

In the present century (to go no further back) the instances in this country are hardly rare of men (may their names be forgotten), men of station, highly educated, who, succumbing to temptation, have exchanged honor for infamy.

If proof were needed to show the vast power of enticement, it is found in the prayer, "Lead us not into temptation."

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* Trial of Col. Despard (taken by Gurney), p. 174.

CHAPTER VII.

OF SUSPICION.

Dr. Johnson defines suspicion to be, "Imagination of something ill without proof." With this agree the suspicions, fancied wrongs, which Terence places among the troublesome incidents to love.*

And the different kinds of suspicion mentioned by Bacon, in his essay on the subject, those which "dispose kings to tyranny, husbands to jealousy, wise men to irresolution," are thoughts without proof, images floating in an obscure atmosphere. "Suspicions amongst thoughts," he says, "are like bats amongst birds, they ever fly by twilight."

A suspicion that a person entertains may be grounded on something which he either sees or hears. And those which spring from what is heard through some tale-bearer, are pointed out by Bacon as of the most noxious kind. These he likens to the sting of an insect; others to the harmless buzz of it. "Suspicions that the mind of itself gathers are but buzzes; but suspicions that are artificially nourished, and put into men's heads by the tales and whisperings of others, have stings."

Some men have so much mastery over themselves that they do not suffer their faces to betray their hearts, although agitated by strong passion; or if there is not a perfect concealment from all beholders, there is from some. †

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* Ter. Eun. A. i. S. 1. † Richard III. A. iii. S. 4.

But this power over the countenance is probably not common; and certainly a usual source of suspicion is a person's look, gesture, or manner, which discloses some painful or disturbed state of his mind; his sense, it may be of guilt.*

A person's countenance, however, may raise suspicion, yet not of guilt; for happily a sense of guilt is not so common as feelings of an innocent character. A face often foretells unwelcome news. Such a one wore Gulliver's master, the Houyhnhnm, on his communicating to Gulliver the intelligence, unpleasant to both, that he must leave his service. "In the midst of all this happiness," the traveler says, "and when I looked upon myself to be fully settled for life, my master sent for me one morning a little earlier than his usual hour. I observed by his countenance that he was in some perplexity, and at a loss how to begin what he had to speak."†

Sorrow in the countenance every day foreshows the dreaded certainty of death.‡ Suspicion is a constant attendant on crime, and often leads to the proof of it. Cicero tells us what is the common course of crime.§ Signs of resistance to force, and a corpse's appearance, may cause a strong suspicion of murder.‖

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* Hamlet, A. iii. S. 2.

† Gulliver's Voyage to the Houyhnhnms, ch. x.

‡ Henry IV. Part ii. A. i. S. 1.

§ In general, crime, first of all, creates suspicion; next follows talk and common report about it; then comes the prosecution, succeeded by conviction and punishment.—*Cic. De Fin.*, i. 16.

‖ "Plautius Silvanus, one of the prætors, impelled by some secret motive, threw his wife Aprouia out of the window of her apartment, and killed her on the spot. Being immediately seized by his father-in-law, Lucius Apronius, and conveyed to the presence of the Emperor, he made answer, with an air of distraction, that while he lay asleep, his wife committed that act of violence. Tiberius went directly to the house. He

So, on the other hand, a suspicion of murder may be suspended or layed, by a want of signs of conflict, or of other circumstances, which would be likely to attend it. *

In a case of a murder, the deed is proved to have been done by some one; and often there are facts surrounding it, which are a source of suspicion that it was done by a particular person. †

Suspicious facts surrounding a deed of murder may be,—the suspected person's nearness, about the time of the murder, to the place where it was committed; his words uttered before the deed, as of anger, hatred, vengeance; his words spoken after it; his possession of a weapon suitable to effect the deed; the condition of it, as bearing marks of violence or stains of blood; stains of blood upon his body or clothes; prints of shoes, corresponding with his own shoes, on the ground at or near the place of the crime; his appearance or behavior after the deed, as his change of color, stammering, trembling. These, or the like, facts constantly create a suspicion that the person, to whom they apply, is guilty of the deed. ‡ Shakspeare represents Henry V. as putting into the hands of Cambridge, Scroop, and Grey, certain papers convicting them of treason, and describes the effect they had on them. § In the story told by Cicero there were circumstances of great suspicion, that, of two guests at an inn, one

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examined the apartment, and saw evident signs of a person who had struggled, but was overcome by force."—MURPHY. *Tacitus, Annal.* iv. 22. And see Henry IV. Part ii. A. iii. S. 2.

* Lara, canto ii. † Henry VI. Part ii. A. iii. S. 2.

‡ Cic. Orat. Partit. 11, and see 33; also, Romeo and Juliet, A. v. S. 3; Macbeth, A. i. S. 7; The Corsair, canto iii.

§ Henry V. A. ii. S. 2.

had murdered the other.* An attempt to conceal something is often a source of suspicion.† Flight is a cause of suspicion.‡ When a crime has been committed, and a suspicion of the guilt of it attaches on a person, from his sudden disappearance from the place or neighborhood of it; to ascertain the soundness of the suspicion, the first inquiry obviously should be, is the going away a flight? One of many innocent causes, business, or pleasure, may have occasioned the departure; and, relatively to the crime, the going away at this particular time may have been purely accidental. And supposing the departure to be really flight, it may be flight, not by reason of the crime, but from a motive quite independent of it, as to escape from creditors. In the case of Crossfield, tried in 1796, for high treason,

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* A man going to market, and carrying money with him, was overtaken by another man. The two entered into conversation, and from thence arose an inclination on the part of both to keep together as friends. And accordingly, when they had both entered the same inn, they agreed to sup together, and to sleep in the same room. Supper being over, they both retired to rest in the same chamber. But the innkeeper (as was afterward discovered on his being taken up on another charge) having seen the money, which the one of them carried, arose in the night, and so soon as he perceived his two guests to be sound asleep, he approached them, and seeing the sword of the one who had not the money lying near him, he drew it from the sheath, and with it killed his companion; and having stolen the money, he replaced the bloody sword in the sheath, and went to bed again. Now the man, whose sword had been used to perpetrate the murder, arose long before day-light, and repeatedly called out to his companion in order to wake him. And receiving no answer, he naturally attributed this to the man's being asleep. And taking up his sword and the other things he had brought with him, he set out alone. The innkeeper, not long after, raised a cry that a man was murdered; and he, together with some of his guests, pursues and overtakes the man, who had before gone out. He seizes him, draws his sword, and exhibits it bloody. The owner is carried to Rome, and prosecuted for the murder.—*Cic. De Inventione*, ii. 4.

† See King Lear, A. i. S. 2.

‡ Macbeth, A. ii. S. 4.

there was evidence of his leaving England. For the prosecution it was said, that the prisoner left England to avoid being involved in the present charge; and for the defense there was evidence to show, he went abroad to escape from his creditors. The Chief Justice Eyre, in his summing up, told the jury—"You have heard a great number of observations upon the particular parts of the evidence, as to the person's conduct, respecting his originally withdrawing himself from this country. It will be a point for you to satisfy yourselves about; whether he did withdraw himself from this country, under the apprehension of being involved in this charge, or whether he withdrew from this country, merely on account of the pressure of his circumstances. . . . . If this man withdrew from the danger, that he thought himself in, of being apprehended under this charge, that is a strong corroboration of all the rest of the evidence. On the other hand, if he withdrew from the mere pressure of his circumstances, he will avoid all the inferences that have been made from his conduct in that particular." *

Flight there may be, without any crime at all; but caused by an act that is no crime; an act done innocently by one, who has not courage enough to stay and explain it. Such was the flight of Tyrell, who slew William Rufus: without informing any one of the accident, he put spurs to his horse, hastened to the seashore, and embarked for France.†

Suspicious circumstances are capable of explanation; and the effect of explanation may be, to lessen their force, or even wholly to destroy it. Taking the suspicious facts, above noticed, surrounding a deed of

* Crossfield's Trial (taken by Gurney), pp. 318, 319.

† Hume's Hist.

murder,—the suspected person may innocently have been near the place about the time of the murder; his words may have been quite unconnected with the crime; the condition of the weapon may be otherwise accounted for; so may the stains on his body or clothes; the shoes may not have been his; or, if his, they may have been worn by somebody else; his appearance and behavior may be shown to be innocent.

The following story contains a lesson against rash suspicion:—"At the foot of a mountain there issued out a clear spring of water, at which a soldier alighted from his horse to drink. He was no sooner gone, than a little boy came to the same place; and finding a purse of gold, which the soldier had dropped, took it up, and went away with it. Immediately after this came an infirm old man, weary with age and traveling; and, having quenched his thirst, sat down to rest himself by the side of the spring. The soldier missing his purse returns to search for it, and demands it of the old man, who affirms he had not seen it, and appeals to Heaven in witness of his innocence. The soldier, not believing his protestations, kills him." *

In Cymbeline, some very suspicious circumstances, invented by Iachimo to prove Imogen faithless to her husband, are most satisfactorily explained.† "The gentle Desdemona married to the Moor," what a source of suspicion was "that same handkerchief!" And how ill-founded! ‡ The unfounded suspicion of Hero's disloyalty to Claudio furnishes, perhaps, the most affecting incident in all Shakspeare's plays. §

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* The Spectator, No. 237.

† Act ii. S. 4; A. v. S. 5.

‡ Othello, A. iii. S. 3, 4; A. iv. S. 1; A. v. S. 2.

§ Much Ado About Nothing, A. ii. S. 2; A. iii. S. 3; A. iv. S. 1.

CHAPTER VIII.

OF PROBABILITY.*

What probability is we are told by Locke: "Probability is likeliness to be true; the very notation of the word signifying such a proposition, for which there be arguments or proofs to make it pass, or be received for true. The entertainment the mind gives this sort of propositions is called belief, assent, or opinion, which is the admitting or receiving any proposition for true, upon arguments or proofs that are found to persuade us to receive it as true, without certain knowledge that it is so. . . . . Probability being to supply the defect of our knowledge, and to guide us where that fails, is always conversant about propositions, whereof we have no *certainty*, but only some inducements to receive them for true. The grounds of it are, in short, these two following: First the conformity of any thing

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[* "Nothing is impossible which does not involve a contradiction. . . . There is a possibility that Bonner may have been a good Protestant, who, being convinced that the blood of martyrs is the seed of the Church, heroically went through all the drudgery and infamy of persecution, that he might inspire the English people with an intense and lasting hatred of Popery. There is a possibility that Jeffries may have been an ardent lover of liberty, and that he may have beheaded Algernon Sidney, and burned Elizabeth Garnet, only in order to produce a reaction which might lead to a limitation of the prerogative. There is a possibility that Thurtell may have killed Weare only in order to give the youth of England an impressive warning against gaming and bad company. There is a possibility that Fauntleroy may have forged powers of attorney only in order that his fate might turn the attention of the public to the defects of the penal law. These things, we say, are possible. But they are so extravagantly improbable, that a man who should act on such suppositions would be fit only for Saint Luke's."—Macaulay.—*Essay on Lord Bacon.*]

with our own knowledge, observation, and experience. Secondly, the testimony of others, vouching their observation and experience. . . . . Probability wanting that intuitive evidence which infallibly determines the understanding, and produces certain knowledge, the mind, if it would proceed rationally, ought to examine all the grounds of probability, and see how they make more or less for, or against, any proposition, before it assents to or dissents from it; and, upon a due balancing the whole, reject or receive it, with more or less firm assent, proportionably to the preponderancy of the greater grounds of probability on one side or the other. For example: If I myself see a man walk on the ice, it is past *probability*, it is *knowledge*. But if another tells me he saw a man in England, in the midst of a sharp winter, walk upon water hardened with cold; this has so great conformity with what is usually observed to happen, that I am disposed, by the nature of the thing itself, to assent to it, unless some manifest suspicion attend the relation of that matter of fact. But if the same thing be told to one born between the tropics, who never saw nor heard of any such thing before, there the whole probability relies on testimony; and as the relaters are more in number, and of more credit, and have no interest to speak contrary to the truth, so that matter of fact is like to find more or less belief. Though to a man whose experience has been always quite contrary, and who has never heard of any thing like it, the most untainted credit of a witness will scarce be able to find belief. As it happened to a Dutch ambassador, who, entertaining the king of Siam with the particularities of Holland, which he was inquisitive after, amongst other things, told him that the water in his country would sometimes in cold weather be so hard, that men walked

upon it, and that it would bear an elephant, if he were there. To which the king replied, 'Hitherto I have believed the strange things you have told me, because I look upon you as a sober, fair man, but now I am sure you lye.' Upon these grounds depends the *probability* of any proposition; and as the conformity of our knowledge, as the certainty of observations, as the frequency and constancy of experience, and the number and credibility of testimonies, do more or less agree or disagree with it, so is any proposition, in itself, more or less probable." *

Experience, as we may learn from the above passage, is closely connected with probability. And of experience, Archbishop Whately says: "This word, in its strict sense, applies to what has occurred within a person's own knowledge. Experience, in this sense, of course relates to the past alone. Thus it is that a man knows by experience what sufferings he has undergone in some disease. More frequently the word is used to denote that judgment, which is derived from experience in the primary sense, by reasoning from that in combination with other data. Thus, a man may assert, on the ground of experience, that he was cured of a disorder by such a medicine—that that medicine is generally beneficial in that disorder. It is in this sense only that experience can be applied to the *future*, or, which comes to the same thing, to any *general* fact; as, *e. g.*, when it is said, that we know by experience that water exposed to a certain temperature will freeze." †

There is no probability more often thought of, and

* Locke on the Understanding, Book IV. ch. xv. See also, on Probability, Butler's Introduction to his Analogy of Religion.

† Whately's Elements of Logic, Appendix v. Experience, ed. 1850.

talked about, than that of the coming weather. And certainly from experience it may often be rightly judged of.* The boatman who embarked Cæsar and his fortune, presaged the storm that overtook them.†

A case of probability of the death of a person is when he has not been heard of for a great number of years.‡ On the subject of a missing person a rule of law has prevailed, that a person is to be presumed to be dead who has not been heard of for seven years. This rule has by different judges been acknowledged in the following terms: "The presumption of the duration of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time when they were last known to be living."§ "That presumption arises from the great lapse of time since the party has been heard of; because it is considered extraordinary, if he was alive, that he should not be heard of. In other words, it is presumed that his not being heard of has been occasioned by his death, which presumption arises from the considerable time that has elapsed."‖

For some purposes in the affairs of the world, and especially those relating to property, it may be a convenient rule to fix a certain time, as seven years, at the end of which a person, not heard of during all that time, shall be presumed to be dead; but it may be doubtful whether it is desirable to take the mere fact of not hearing of him for a certain time as a sufficient ground for the presumption. This presumption is founded on probability; and whether there is a prob-

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* Henry IV. Part i. A. iv. S. 4. † Lucan, Phars. v. 539.

‡ See The Corsair, canto iii.; and Lara, canto i.

§ By Lord Ellenborough, 6 East, 85.

‖ By Lord Denman, 2 Mees. and Wel. 913.

ability of death, will certainly depend on the particular circumstances of each case: as the age and constitution of the missing person; his profession, trade, calling, or pursuit in life, whether perilous, unhealthy, or otherwise tending to shorten life; the climate of the country he lived in when last heard of; his power of communication, by writing or otherwise, with his friends.

Generally speaking, allowing for the missing person's age and constitution, and for climate, and any other peculiarities in the case, it may be right, and certainly most safe, to take the probability to be, that up to the average term of man's life, the absent person is alive. Why suppose him to be dead?*

[* The Revised Statutes of New York provide: If any person, upon whose life any estate in lands depends, remains beyond sea, or absents himself, for seven years together, he shall be accounted naturally dead in any action concerning such lands, in which his death is in question, unless he is proved to be alive (1 R. S. 749, s. 6). As to presumption of death, see *O'Gara* v. *Eisenlour* (7 Transcript Appeals, 310).

We remember a case where a man left the city of New York without the knowledge of his wife and family. Soon after a body was found, which was supposed to be his, but so mutilated and decomposed as to render the identification uncertain. It was, however, the belief that he was dead, and this belief was continued until, after an absence of more than twenty-nine years, he returned. He had never been heard of during his absence. He had no welcome to his return, which was not altogether voluntary. Living in a distant State, under an assumed name, he had fallen sick, and, being in poverty, to obtain assistance, he told of property he had in New York, his right to which he was willing to exchange for present shelter and support. This excited the cupidity of one of his hearers, who brought him on to New York, took from him a conveyance of the property, and set to work to recover it. We, on behalf of the surviving relatives of his wife, saw this man, and endeavored in vain to extract from him a reason for his strange conduct. We would mention another case of prolonged absence and subsequent return, the account of which came from the man's wife, and under circumstances which led us to believe her statement to be true. A. B. was a portrait painter in Brooklyn, he suddenly disappeared, and all efforts to trace out what had become of him were unavailing. After an absence of nearly fifteen years, he one day quietly entered the house where his wife

The following are facts in a cause, *Dowley* v. *Winfield*, before the Vice-Chancellor Shadwell: In or about September, 1830, F. W. Dowley, who was then about fifteen years old, left England as one of the crew of a South Sea whaler, called the *Partridge*, which arrived in London, on its return from the South Seas, in the beginning of 1834. Dowley did not return in her, and no tidings had been heard of him since he left England, except that in February, 1834, the captain of the ship stated that Dowley ran away from the *Partridge* at Woahoo, one of the Sandwich Islands, about two years then since, and that the captain had heard nothing of him subsequently; that several ships were lying at Woahoo, and the captain thought it not unlikely that Dowley might have got on board one of them bound for America. In consequence of this information, an advertisement was inserted in *The Times* and *Morning Advertiser* newspapers, on the 3d of October, 1834, addressed to merchant seamen and others, and requesting to be furnished with information as to the then abode of Dowley, or, if he was dead, as to the place of his decease; and 500 copies of this advertisement were printed and distributed at the various docks in London. In 1835, another advertisement was published in *The Times*, and in two Liverpool newspapers, and also in several American newspapers, offering a reward of £50 to any person who would furnish information as to the place of abode, or death, of Dowley. In 1844, Sir L. Shadwell made an order which declared that, under the circumstances, it was to be presumed that Dowley

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resided, remained there a portion of the day, refusing in any way to account for his absence. Before night he again disappeared, as suddenly and as completely as on the previous occasion, and, although twelve years intervened the second disappearance and the narration of the circumstance to us, he had neither returned nor been heard of.]

was dead. In this case it will be seen Dowley had not been heard of for twelve years. The presumption was made with the view to the transfer to the plaintiff of certain property in which Dowley had an interest; and the Vice-Chancellor did not consider the evidence as conclusive that Dowley was dead, inasmuch as he directed the property to be transferred to the plaintiff, on his giving security to refund it in case Dowley should be living.*

In *Watson* v. *England*, a case which also came before the Vice-Chancellor Shadwell, in 1844, a person had not been heard of since the year 1814, a period of thirty years. The decree in the cause directed the Master to inquire whether Mary Bilton was living or dead. The Master reported that she was dead, and that she died in 1821, being seven years after she was last heard of. The report was founded on an affidavit of a person, not a relative of Mary Bilton, who deposed that in 1809 or 1810, when she was about sixteen or seventeen years of age, she clandestinely left the house of her father, who was a small farmer in Yorkshire; and that she had not been since heard of, except that, in 1814, she wrote a letter to her sister from Portsmouth, stating that she intended to go abroad. The question was, whether the above evidence was sufficient to warrant the Master's finding. And upon this question Sir L. Shadwell thus expressed himself: "It strikes me that there is considerable difficulty about this case, which, like every case of the same nature, must be determined according to its own peculiar circumstances. Here a girl of about sixteen or seventeen years of age, whose father was a farmer, chose, for some reason which does not appear, to leave her father's

* Dowley *v.* Winfield, 14 Sim. 277.

house, and to go no one knows whither. But it seems that in August, 1814, she was at Portsmouth, and that she then intended to go abroad. Therefore, it is but reasonable to presume that all along she had been concealing herself, and that she never intended to return home. The mere fact of her not having been heard of since 1814, affords no inference of her death; for the circumstances of the case make it very probable that she would be never heard of again by her relations. How can I presume that she died in 1821, from a fact which is quite consistent with her being alive at that time? The old law relating to the presumption of death is daily becoming more and more untenable. For owing to the facility which traveling by steam affords, a person may now be transported, in a very short space of time, from this country to the back woods of America, or to some other remote region, where he may be never heard of again." *

A somewhat similar case is *Bowden* v. *Henderson*, before Vice-Chancellor Stuart, in 1854. Here the person missing was L. L., an Englishwoman, who, when last heard of, was living in Paris. The circumstances in evidence Sir J. Stuart considered not to be sufficient to raise a presumption of her death. "The principle," he said, "on which the Court presumes the death of a person, of whom no tidings have been received for a long period of time, is this: that if he were living, he probably would have communicated with some of his friends and relatives. It is a conclusion which the Court draws from the probabilities of the case. It is quite clear, therefore, that when no such probability exists, the presumption cannot arise. In this case, all the circumstances tend to show that, after what had

* 14 Sim. 28.

taken place between L. L. and her friends, it was extremely improbable she would have entered into further communication with them. She had abandoned her religion, and her friends wrote to her a letter of remonstrance and reproach for so doing. These reproaches were not calculated to encourage further communications. I think this circumstance, taken in connection with the rather eccentric course of life which, it appears from her letters, she pursued, render it improbable that she would have further communicated with her friends. If I am right in this view, it follows that the presumption of her death does not arise from the absence of information, or of communication, when that absence is natural, even if the lady were still alive." *

Another case involving a question of probability is, when a vessel being lost at sea, and two persons on board so perishing, the question is, whether one of them survived the other, and if one did, which of them. In October, 1766, General Stanwix, his second wife, and his daughter by his former wife, set sail in the same vessel from Dublin for England. The vessel was lost at sea, and the manner of her perishing was not known. Here the question related to the deaths of the General and his daughter.†

On the following circumstances, in *Underwood* v. *Wing*, which came before Sir John Romilly, M. R., the question related to the deaths of a husband and his wife. "In October, 1853, Mr. and Mrs. Underwood, and their three children, embarked on board the ship *Dalhousie* for Australia; but on the 19th the ship foundered off Beechy Head; and, with the exception of one sailor, Joseph Reed, all on board perished. It

* 2 Smale and Giff. 360. † The King *v.* Hay, 1 W. Blackstone, 640.

appeared clear that Mr. and Mrs. Underwood, and their two boys, were washed into the sea by the same wave, but their daughter survived, and perished a short time afterward." . . . . . "Joseph Reed, the only person able to give any account of what had taken place, was examined After describing the ship's going over on her beam ends, he proceeded as follows: 'From where I was, I could see what the other people on the ship were doing. Four of the Underwood family were drawn out of the port quarter gallery, while I was on the weather quarter; I helped to draw them out myself. The four were, the two boys and Mrs. and Mr. Underwood. I don't believe they were there more than three minutes at the outside. As I was helping to clear away one of the boats, I heard a scream, and looked round, and saw Mrs. Underwood grabbing for, or trying to lay hold of, one of the boys. I saw her take hold of him, while they were both on the side of the vessel. The mother was with the two boys; the father was close to them by the ship's rail, a good two steps off from them. The next I saw was, they were all together; the husband had his wife in his arms, and the two boys were holding on to the mother; they were all clasped together. I don't believe it was a minute before a sea came and swept them all off; they seemed to go off all at once; I don't think they were separated. I saw no more of them; the sea swept them right off; none of them ever came in sight again that I saw; I did not see Mr. Underwood again. The daughter was not with them at that time; she was picked up from the forward part of the poop, abreast of the main rigging. I saw the daughter alive after the others went down.' He then described the attempts made to save Miss Underwood, the last survivor of the family, who was lashed to a spar, and afterward

swept into the sea and perished; and the witness then proceeded thus: 'It was while Mr. and Mrs. Underwood and the boys were clasped together, as I have before described, that they were washed over. They were clasped together in this manner:—the boys had hold of the mother, and the father had his arms round them all, and they were in that state when the sea swept over the vessel. That was the last I saw of them. At the time Mr. and Mrs. Underwood were washed away, they did not seem to be exerting themselves; they seemed resigned to their fate.' Besides the evidence of Reed, there was that of the plaintiff's witnesses, 'which explained the process and effect of death by drowning, technically called *asphyxia*, and which, they said, supervened within two minutes after submersion, though life continued for a short time afterward.' The defendant's witnesses 'thought that two persons submersed at the same time would not die at precisely the same instant, and that the husband must, in all human probability, have been the survivor. This opinion was founded on the greater buoyancy of the husband's body, which is generally less in a female than in a male; on his greater strength and power of resisting the causes of death; on the fact of his being a good swimmer; and the probable effects of female terror to accelerate drowning, and on her screaming, which would exhaust the air from her lungs.' Sir John Romilly's judgment in this cause contains the following, among other observations: 'In this case, the evidence of Joseph Reed is distinct and clear, as to the mode, in which the death took place. The evidence is given in a very striking manner, and with details, which cannot fail to impress anybody who has heard it, with the truth of what he states, and the belief that he was stating exactly what took place. That he was

in a condition of mind to be able to see what happened, is evident, from the fact of his being so attentive to others, by his attempt to save the girl from an imminent death, by lashing her to a large spar, which, at all events, prolonged her life for some period of time, and gave her a chance, however remote, of preservation. The witness noticed exactly what took place, he attended to the whole of the circumstances; and his evidence to me is distinct: that he saw the wife and the two children clinging to her, and the husband with his arms around them, all swept away by a wave into the water; that they then disappeared, and he never saw them again; and he believes they disappeared in an eddy produced by the action of the waves and the resistance of the vessel combined. It is impossible for me to doubt or disbelieve that evidence, or to adopt the suggestion of any thing different having occurred. This evidence is to me quite distinct and clear, and it establishes, that those four persons were immersed together in the water, that they sank at once, and never appeared again. Then the question, in that state of circumstances, is, whether I can come to the presumption, that the husband survived his wife. The evidence before me on the subject is all one way: it states that insensibility takes place in the space of about a minute; and that death takes place in two or three minutes; but that it is totally impossible to determine exactly; that this does not depend apparently upon any peculiar circumstances of constitution, if the person die from drowning. It appears, however, that a person may die from a cause produced by an immersion, which is not, properly speaking, drowning. I have no evidence whatever upon this subject applicable to the present case; but when I am asked to infer from the medical testimony, that a woman is more liable to

such accidents, and that therefore she probably died first, I may as well assume that the husband died from apoplexy, as that the wife died from any sudden cause other than drowning; because it appears, from the evidence of a medical man, that apoplexy is a frequent cause of death in the case of sudden immersion in water, as well as *asphyxia*. . . . . It is impossible for this court to say, that there is any evidence before it to show which, of this group of four persons, who were swept into the sea on the 19th of October, was the survivor. If I were compelled to decide, as to the relative periods of death of each on this evidence, I should judge the probability to be, that they all became insensible at the same moment, and that, in fact, death took place as nearly as possible at the same time. . . . . My opinion is, that I must consider that there is no evidence to show who is the survivor; and the conclusion of law is, that I cannot found any decision on the assumption that either was the survivor.' " *

A knowledge of human nature is one kind of knowledge, from which to judge of probability. By it we think it probable a mother loves her child.†

By what we have done ourselves, or have seen or known others do, we may judge of the probability of the same or the like deed being accomplished by some other person; as, for instance, his ability to walk a certain distance in a given time. So with regard to our own or others' mental power, we may by ex-

* 19 Beaven, 459. Wing *v.* Angrave, S. C. 30 Law J. Rep. (N. S.) Chan. 65. [Where two parties perish by the same event, as in a shipwreck, and nothing more is known as to which died first, the presumption of priority will be raised from the comparative age, health, and strength of the parties.—*Sillick* v. *Booth*, 1 *Y. & C.* 121.]

† Cic. De Inventione, i. 29.

perience judge of the probability of the same or the like being successfully exercised by some other person; as his power to remember the particulars, or the substance, of a long speech or discourse he has heard.

With regard to some particular situation or circumstances, in which a person may have been placed, and what he may have then said or done, we ourselves personally may never have found ourselves in such a situation or circumstances; and yet it may be in our power to judge of the probability of that person's saying or doing what, we are told, he did say or do. Our knowledge of human nature may give us this power; and this knowledge we may gain by our insight into ourselves: "As in water, face answereth to face, so the heart of man to man."* If then, from such inspection of ourselves, we think it likely, that, in the supposed situation or circumstances, we ourselves might have said or done this or that, we may rightly consider it probable the individual in question may have said or done the same thing.

From his own knowledge, whether from observation, experience, or other source, a man thinks a thing to be probable. But probability, and thinking a thing to be probable, may be very different matters; that is to say, probability according to just reasoning or calculation, and probability according to the thought of a particular person. For as the thought depends on knowledge, the individual may not have the knowledge necessary to judge of the probability under the particular circumstances. By reason of age, education, or manner of life, and a variety of other things, he may be incapable of forming a judgment on the probability.

* Proverbs xxvii. 19. Men very much resemble each other, not only in their good qualities, but their bad.—*Cic. De Leg.* i. 11.

On the other hand, the same matters may peculiarly fit another person to see the probability in the case. And so under the very same circumstances, what one man thinks probable, another may think improbable.

Steele, in one of his papers in the Spectator, mentions "a particular set of people, who, in their own favor, resolve every thing that is *possible* into what is *probable*, and then reckon upon that *probability*, as on what must *certainly* happen." He then points out the deceptive nature of this kind of reasoning, shows that certainty is far removed from probability, and teaches how dangerous it is to imagine that the passage from the one to the other is easy and sure. This he does in a humorous story which he tells of three young ladies, who rated their *possible* fortunes, as *probable*, if not *certain*, upon the following scheme of their own:

"'Our father is a youngish man, but then our mother is somewhat older, and not likely to have any children: his estate being worth £800 per annum, at 20 years' purchase, is worth £16,000. Our uncle, who is above 50, has £400 per annum, which, at the aforesaid rate, is £8,000. There is a widow aunt, who has £10,000 at her own disposal left by her husband; and an old maiden aunt, who has £6,000. Then our father's mother has £900 per annum, which is worth £18,000; and £1,000 each of us has of her own, which cannot be taken from us. These, summed up together, stand thus:

Father's	£800	£16,000
Uncle's	400	8,000
Aunts'	10,000 / 6,000	16,000
Grandmother's	900	18,000
Own, each,	1,000	3,000
	Total	£61,000

"'This, equally divided between us three, amounts to £20,000 each; an allowance being given for enlargement upon common fame, we may lawfully pass for £30,000 fortunes.'

"But mark the end. The mother dies, the father is married again, and has a son; on him was entailed the father's, uncle's, and grandmother's estate. This cut off £42,000. The maiden aunt married a tall Irishman, and with her went the £6,000. The widow died, and left but enough to pay her debts and bury her; so that there remained for these three girls but their own £1,000." *

Cicero considers a narrative to be probable, when it contains circumstances, which are usually found in a story that is true.†

When a probability arises out of circumstances, which bear to be looked at in different ways or lights, it is sometimes a question on which side the probability lies. On the occasion of the fray between Clodius and Milo, in which the former was killed, if it became a question which of the two planned the meeting, the time and place of rencontre, the probability is very great that Clodius did, and not Milo. This is lucidly and forcibly set forth by Cicero in his defense of Milo.‡

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* The Spectator, No. 282. † Cic., De Invent. i. 21.

‡ Milo, who on that day had been in the Senate, as soon as the Senate broke up went home, and changed his dress; and there he stayed a short time, while his wife prepared herself to go with him into the country. He then set out, at the time when Clodius, if he had intended that day to return to Rome, might be setting off. The two met on the road: Clodius on horseback, not in a carriage, with no luggage, and with none of his Greek retinue, who usually accompanied him; without his wife, which scarcely ever happened: whereas Milo, this waylayer, who had planned this journey purposely to assassinate Clodius, rode, not on horseback, but with his wife in a carriage, wrapped in his usual thick traveling cloak, and having with him a crowd of attendants, and among them young women and boys.—*Cic., Pro Milone*, 10; *and see* 20, 21.

As knowledge is the ground of thinking a thing to be probable, so is it of thinking a thing to be improbable. We think it is improbable, when we consider it to be inconsistent with what we know. Our knowledge of human nature teaches us, that children love their parents. Inconsistent with this love is a child's desire to injure his father in any way; and very inconsistent with it is his desire to put his father to death. If then a son is suspected of having murdered his father, a strong argument in favor of the son's innocence is the improbability of the crime. On this topic Cicero much enlarges in his defense of Roscius Amerinus, accused of parricide.* Cicero then continues by citing the case of two sons suspected of murdering their father; but whose innocence was evident from the improbability they would be able to sleep, as it was proved they did, so soon after the deed.†

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* The charge is parricide; yet the prosecutor assigns no motive for the crime. The very thing, which in the lightest, most frequent, and nearly daily offenses, is sure to be chiefly and first of all inquired into, namely, the motive: this the prosecutor in a case of parricide does not deign to notice; a crime of so great enormity, that although many circumstances concur to raise suspicion, yet guilt is not rashly believed on the faith of conjecture and doubtful testimony, and the prosecutor's ingenuity of argument. You must show that the accused is an old offender, that he has led a life of the utmost depravity, that his career has been one of recklessness bordering on insanity. And supposing you make out this, yet to induce belief of the son's guilt, you must bring positive evidence of all the circumstances,—the commission of the crime, when and where it was perpetrated, with what motive, and through whose assistance. And unless this evidence be full and complete, a crime so black, so atrocious, cannot be believed. Against it there is the common tie of humanity; community of blood revolts at it; nature herself forbids a bare suspicion of it; "a wonderful and horrible thing is committed in the land," would be nature's cry, if the hand of a son were lifted against the life of his father.—*Cic., Pro Rosc. Amer.* 22.

† Not many years ago, one T. Clœlius of Terracina, a man of some note, was murdered; and the story told of the crime is this: After supper Clœlius with his two sons, both young men, retired to rest in the same chamber.

It is from our knowledge of human nature we conclude it is improbable there should be crime without a motive.* The nature of man is such, he does not set about any crime, without a hope of gaining something by it. In defending Cœlius against a charge of attempting to poison Clodia, Cicero asks, Is it likely so great a crime would be committed without any motive whatever? †

Circumstances often betray and manifest the motive of a crime; as, threats, or plunder, the motive of a deed of violence; but where there is not a betrayal of this open kind, the want of appearance of motive is an argument of great force in favor of innocence.

In the morning the father was found dead with his throat cut; and no suspicion of the deed could be fastened on any one of his slaves or freedmen. His two sons, who lay near him, declared they knew nothing about it; they neither saw nor heard, they said, any thing that passed. They were nevertheless, prosecuted for the crime. It was thought there was a case of suspicion against them. Could it be true, it was asked, that they had neither seen nor heard any thing? Would any other person have ventured to enter the room for such a purpose, at a time when, in the very same room, were Cœlius's two sons, both young men, who might easily hear and resist the attack on their father? There was, moreover, no other person upon whom suspicion could attach. Yet, when it had been made plain to the jury, that with the door of their room open, the two sons were found fast asleep, they were not only acquitted, but all suspicion was removed from them: for no one imagined that persons who, by a crime of such atrocity, had violated all laws, divine and human, could have so soon after fallen asleep.—*Cic., Pro Rosc. Amer.* 23.

* Cic., Pro Rosc. Amer. 39. † Cic., Pro Cœlio, 23.

CHAPTER IX.

OF NARRATIVE OF FACTS.

When a person relates facts, consisting of things of which he himself was an eye or ear-witness, sources of his relation will be, his perception of the things he mentions, the impression they made on his mind, his present retention of them in his memory, his power to produce them from it, either instantly, or on time taken to recollect them.

As impressions in the memory are in most, if not all, cases constantly by degrees wearing out, and after the lapse of much time are usually greatly effaced, a narrative of facts may not include all the things that were impressed on the mind; and the number in the memory may depend very much on the length of time, intervening between their occurrence and the time of the relation. So that with regard to narrative, it must be constantly assumed and understood, that it can only extend to things at the time of the relation in the memory, and consequently may leave out others, which were once there, but have in the course of time escaped from it.

The facts will generally consist of things which the relater both saw and heard, and often will include besides what he himself said and did. It will be a just object of the narrative, to make the hearer, so far as may be, mentally see and hear these things, exactly as the relater saw and heard them, and himself said and did them. And supposing the narrative is meant to be confined to these facts, conjecture, fancy, and hearsay,

will be wholly excluded from it. And to aid the hearer to see, as exactly as may be, what the relater saw, a model, or map, is obviously in some cases of great use; as a model of a house or other building; or a map of a particular parish or district, or confined to particular fields, roads or paths.

How closely to the facts does Shakspeare make Benvolio relate what he saw and heard in the fray between Mercutio and Tybalt, after they had drawn their swords, and were in actual conflict.*

On every judicial inquiry, civil or criminal, before a magistrate, court, or other tribunal of justice, there is a story, the subject of the inquiry, a story of facts. In the case of a trial, usually each side has its own story, the two tales united forming the subject of the trial. It seldom happens, that the whole subject, or even the whole story of either side, is told by one witness; but it commonly consists of different parts, distributed among several witnesses, each of whom tells the share which he is acquainted with.

A witness about to narrate facts, may be left to tell his story in his own way, or it may be drawn from him by questions put to him. The former method of telling the story is open to these objections: The witness may not think enough to call to mind all he can relate; from carelessness or oversight he may omit to mention some circumstances; he may think or fancy the circumstances he withholds are not material to a proper understanding of his story; indeed, he may think or fancy that his story will be best understood, if it be not loaded with matters which he views as redundant, but which nevertheless are essential to see the facts in their proper proportions and color. Another danger is, that the witness

* Romeo and Juliet, A. iii. S. i.

will not confine himself to things which he himself saw, heard, or did, but will diverge into hearsay, or common report, into things, that is, which he has heard some one else say were seen, heard, or done. Supposing, besides, the witness does not wish to speak the whole truth, it is obvious his wish will be promoted, by leaving him to tell his tale in his own way.

The following anecdote, relating to the value of common report, is told of John Wesley: "John had a curious interview there [Bath] with Beau Nash, for it was in his reign. While he was preaching, this remarkable personage entered the room, came close to the preacher, and demanded of him by what authority he was acting. Wesley made answer, 'By that of Jesus Christ, conveyed to me by the present Archbishop of Canterbury, when he laid his hands upon me and said, Take thou authority to preach the gospel.' Nash then affirmed, that he was acting contrary to the laws: 'Besides,' said he, 'your preaching frightens people out of their wits.' 'Sir,' replied Wesley, 'Did you ever hear me preach?' 'No,' said the Master of the Ceremonies. 'How then can you judge of what you never heard? Nash made answer, 'By common report.' 'Sir,' said Wesley, 'Is not your name Nash? I dare not judge of you by common report: I think it not enough to judge by.'" *

In the other method of obtaining a relation of facts, the one by question and answer, the object of the interrogator is, to get from the witness all he himself saw, heard, said, and did, excluding all hearsay, and other irrelevant matter. And the questions being framed with a view to this exclusion, if the witness confines himself strictly to the questions addressed to

* Southey's Life of Wesley, vol. ii. p. 28.

him, his answers will contain no hearsay nor other irrelevant matter. But as, according to this method, the witness's narrative consists solely of his answers to the questions put to him, this obvious inconvenience attends it, that if all the questions required to bring out the witness's whole story are not put to him, he may in his evidence leave out circumstances important to be known.

It is an observation by Dr. Johnson,—"Where many questions are to be asked, some will be omitted;" an observation he made during his journey in the Hebrides, on the occasion when he forgot to inquire how the islands were supplied with the exotic luxuries of wine, tea, and coffee.*

The basis of interrogation of a witness is something of which his examiner desires to be informed, and which he knows, thinks, assumes, or hopes, the witness will be able to tell him.

There are two ways of questioning: one where the words made use of in the question suggest or prompt a particular answer, and which is called a *leading* question; the other, where the question does not so lead, but is put in general terms, without at all pointing to a particular reply. This may be called an *open* question; it is open to any answer. "Did not you see this?" or "Did not you hear that?" are leading questions.† In them the person questioned is in a manner prompted to answer, he did see or hear this or that particular thing. "It is a good point of cunning for a man to shape the answer he would have in his own words and propositions: for it makes the other party stick the less." ‡

* Johnson's Journey to the Western Islands of Scotland, p. 93, ed. Edinb. 1798.

† 3 Bl. Com. 449, 15th ed. ‡ Bacon's Essays: of Cunning.

"Ye will, therefore (addressing Morris), please tell Mr. Justice Inglewood, whether we did not travel several miles together on the road, in consequence of your own anxious request and suggestion, reiterated once and again, baith on the evening that we were at Northallerton, and there declined by me, but afterward accepted, when I overtook ye on the road near Clobery Allers, and was prevailed on by you to resign my ain intentions of proceeding to Rothbury; and, for my misfortune, to accompany you on your proposed route. 'It's a melancholy truth,' answered Morris, holding down his head, as he gave this general assent to the long and leading question, which Campbell put to him." *

Assuming that the person questioned honestly desires to speak the truth, and that his memory is not defective, a strong probability is, that, whether the question be open, or leading, he will return precisely the same answer to it.

Each kind of question has, however, its advantages and disadvantages. If the witness be dishonest, and there be connivance between him and his interrogator; or supposing the former honest, and the latter not to be so; it is plain that a leading question may tend to bring out the answer which the interrogator desires. And assuming that both the witness and the interrogator are honest, both wishing the truth to be spoken; here, if the witness remembers little or nothing, or if he be dull, or heedless, or be confused, or embarrassed by timidity or any other cause, there is danger that, if he is addressed by a leading question, he may, without thought or consideration, echo in his reply the words put in the question, and so fail to speak the truth.

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* Rob Roy.

An open question imposes on an honest witness the necessity of thought, a consideration of both the question and reply. It forces him to resort to, and, if need be, to ransack, his memory, and obliges him to utter only what he remembers. On the other hand, it is very possible, in many cases probable, that from sickness, old age, or other cause, his memory may be so infirm, that he cannot be brought to a correct answer, except by a leading question. All open questions, every question short of a leading one, may fail to quicken his memory, and bring him to express the fact, of which he has knowledge. Nothing, for instance, is more common, than to forget a person's name, and, without hearing it again, to be quite unable to call it to mind. We constantly hear people say, "If I heard his name, I should know it directly." If the name be pronounced, the hearing of it refreshes the power of recollection, and the name is instantly remembered.

"Leading questions, that is, such as instruct a witness how to answer on material points, are not allowed on the examination in chief.* Questions which are intended merely as introductory, and which, whether answered in the affirmative or negative, would not be conclusive on any of the points in the cause, are not liable to the objection of leading." . . . . "Leading questions are admitted in the cross-examination of a witness." †

An abuse of this liberty is thus noticed by Lord Campbell,—"At this time [reign of James II.] leading questions were not allowed to be put in cross-examina-

* [It is in the discretion of the court to permit leading questions on an examination in chief.—*Vrooman* v. *Griffiths*, 1 *Keyes*, 53.]

† Phillipps on Evidence, vol. i. pp. 255, 261, 6th ed.

tion, more than in examination in chief; and I am not sure that the old rule is not the best one—when I consider the monstrous abuse sometimes practised in putting words into the mouth of a friendly witness, necessarily called by the side he is opposed to." *

In a chancery cause, where it was objected that the interrogatories were leading, and to which objection the reply was, that the interrogatories were not leading, as they did not suggest to the witness the answer to be given, Lord Langdale observed,—"All interrogatories must, to some extent, make a suggestion to the witness. It would be perfectly nugatory to ask a witness, if he knew anything about something." . . . . . "It is impossible to examine a witness without referring to or suggesting the subject, upon which he is to answer. If the question suggests a particular answer, it is leading and improper." †

Whenever any person makes a relation of facts, be it on a judicial inquiry or not, and whether he tells his story spontaneously, and without being questioned, or on request and through questions put to him, it is certain the tale is often imperfectly, or falsely, told; and when this is known or suspected to be the case, and it is desired to have the exact truth, to ascertain what part of the story is true, what false, and what is left out, these matters may be learned, by searching for them through questions put to the relator; an inquiry that is called, cross-examination.

"He that is first in his own cause seemeth just, but his neighbor cometh and searcheth him." ‡

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* Lord Campbell's Lives of the Chief Justices, vol. ii. p. 50, n. ed. 1849.

† Lincoln *v.* Wright, 4 Beavan, 171, 173.

‡ Proverbs, xviii.

The command by the mouth of Samuel to Saul was, "Go and smite Amalek, and utterly destroy all that they have; slay both man and woman, infant and suckling, ox and sheep, camel and ass." Saul's imperfect tale,—"I have performed the commandment of the Lord"—would not bear the scrutiny of Samuel; who instantly replied, "What meaneth then this bleating of the sheep in mine ears, and the lowing of the oxen which I hear?" *

"He that travels in the Highlands may easily saturate his soul with intelligence, if he will acquiesce in the first account. The Highlander gives to every question an answer so prompt and peremptory, that scepticism itself is dared into silence, and the mind sinks before the bold reporter in unresisting credulity; but if a second question be ventured, it breaks the enchantment, for it is immediately discovered that what was told so confidently, was told at hazard, and that such fearlessness of assertion was either the sport of negligence, or the refuge of ignorance." †

"Fingal being talked of, Dr. Johnson averred his positive disbelief of its authenticity. And on a gentleman then saying, 'Fingal is certainly genuine, for I have heard a great part of it repeated in the original,' Dr. Johnson asked him, 'Sir, do you understand the original?' And the reply being, 'No, sir.' 'Why, then,' said Dr. Johnson, 'we see to what this testimony comes.'" ‡

On a trial, the cross-examination of witnesses is often of the utmost importance and service toward discovering the truth, and the extent to which the witnesses

* 1 Samuel, xv.

† Johnson's Journey to the Western Islands of Scotland, p. 83, ed. 1798.

‡ Life of Johnson by Boswell, vol. v. p. 138, ed. 1835.

are to be believed. On a civil trial, a verdict for the plaintiff may give him an estate, or money, or other object of the suit; a verdict against the defendant may cause him to lose what the plaintiff gains. In many cases each party is honest, and desires justice alone; but where there is not this upright spirit, either or each of the parties, looking at the consequence the verdict will have, may endeavor to set the facts of the case in a light most favorable to himself, and therefore to mold, disguise, or suppress some of the circumstances. When such is the state of mind of each or either of the parties to a suit, it may be imagined it will sometimes infect the integrity of the witnesses. From this source may arise the unwilling, the prejudiced, the partisan, the false witness. In cases of this description, the service which a cross-examination may be of is manifest. But the benefit of cross-examination is not confined to cases of this disreputable kind. For on every trial, after a witness's examination by his own side, or examination in chief as it is called, is closed, these considerations may arise in the mind of the opposite party: The witness may have spoken truth, but not the whole truth; or he may have spoken the truth, and something besides the truth; or some of the truth may not have been brought out, because questions suited to elicit it were not put to him; the witness may be mistaken in a matter which he has stated as a fact; he may have misapprehended it; he may not have seen what he thinks he saw, or heard what he thinks he heard; he may have spoken to a fact with greater confidence than is justified by his imperfect knowledge of it; his present story may not be consistent with his relation of it on some former occasion; the witness's character may require to be

searched into, to judge how far his evidence is to be believed.

On certain criminal trials, a cross-examination has had the following objects:

1. To show that the witness did not see what he said he saw: as, that the witness, who said he saw the prisoner at a particular place, did not see him there; or, that the witness, who said he saw the prisoner coming from a particular place, was, at the time of seeing him (as he said), unable, from the distance (220 yards) of the prisoner from him, to recognize the prisoner, to distinguish his features, to know him to be the prisoner; or, that the witness, who said he saw the prisoner fire a pistol at another man, was at the time of seeing him (as he said) unable, from the distance (220 yards) of the prisoner from him, to recognize the prisoner.

2. To show that the witness did not hear what he said he heard: as, that the witness, who said he heard particular words spoken by the prisoner to a clamorous mob, was, at the time he heard (as he said) the words, under some agitation of mind, was in a degree in a considerable flurry of spirits; or, that at the time when the witness (as he said) heard certain words spoken by a man at the head of a mob, and addressed to the witness and others, the witness being nearest to the speaker, there was a good deal of noise and confusion; and that the witness was alarmed; and that, considering the noise that prevailed at the time, and the witness's situation, and his alarm, the witness might not be able to swear positively to the precise words used.

3. To show that the witness spoke from hearsay: as, that the witness, who said a mob set fire to a chapel, did not see them do it; that it was on fire when

the witness first saw it, and who set it on fire he did not know; nor did he know that it was a chapel, only some body told him so.

4. To test the truth of what the witness has said in general terms, by making him particularize: as, when the witness has spoken in general terms of many persons, saying, for instance, that many persons were present at a particular place, or many persons were forced to do a particular act against their will, to test the truth of the witness's evidence by asking him to tell the names of some persons, or the name of even one person present, or forced to do the act mentioned; or, when the witness has given evidence of words spoken by the prisoner to a large body of men, to test the truth of his evidence by asking the witness whether he can name any person who was present when the prisoner spoke the words mentioned

5. To show that the witness, who had identified a thing, had done so through the manner in which the identification had been put, or left to him: as, where the witness had identified a great-coat as the great-coat worn by the prisoner on a particular occasion; and the witness, in his cross-examination, was asked whether the great-coat was not produced to him as the great-coat the prisoner had on; whether it was produced to the witness singly, or with any other great-coats.

6. To procure an explanation of words used by the witness: as, that the witness, who said the prisoner was at home on particular days, did not mean that the prisoner did not go out on those days, but only that he was at home some part of each of those days.

7. To show that the conduct of the prisoner was consistent with his innocence, was inconsistent with guilt, was open, without concealment: as, that, with regard to papers which the witness found and seized

at the prisoner's house, during the whole time the witness was employed in searching for them, there was not any endeavor made by the prisoner, or any of his family, to conceal or secrete any of them; or, that, with regard to an acquaintance which the witness said subsisted between the prisoner and himself, the witness was not in confidence with the prisoner; and with regard to a conversation, which the witness said the prisoner introduced to him, the prisoner imposed no confidence on him, and acquainted him that he had mentioned the matter of the conversation to some other persons, and intended to mention it to more; or, that with regard to a matter, which the witness said the prisoner communicated to him, on the prisoner's accidentally meeting and stopping him in the street, the prisoner communicated it to him in the open street, and not with any secrecy; or, that the prisoner, who went on board a ship at Portsmouth about a week before it sailed, and who, on the part of the prosecution, it was alleged, went on board to fly from the accusation against him, did, when on board, pass by his own name, and at Portsmouth came on shore several times, and went publicly about the streets; or, that at the time the prisoner was in custody, no man could act with more openness in all his conduct than did the prisoner; that on his examination before the magistrate at L., he was discharged on his own recognizances; that after he was discharged, he remained at L. for nine days, until he was again taken into custody; and the witness, clerk to the magistrates at L., knew where the prisoner was the whole of that time, and frequently saw him.

8. To cause the witness to repeat something which, on his examination in chief, he has said favorable to the prisoner: as, that he could not identify the prisoner as being one among a body of men; or, as the man

who had used certain words; or, that although the prisoner was present when certain words were used, he was not near enough to hear them.

9. To show that the evidence now given by the witness contains some addition to, or contradiction of, or otherwise differs from, his evidence, statement, or story given, made, or told on some previous occasion.

Many are the just objects of a cross-examination, according to the circumstances of the case in which it is used, its only design being to elicit truth. But the legitimate end of a cross-examination is sometimes perverted to serve a bad purpose—to alarm, mislead, or bewilder an honest witness;* when the effect may be to hide rather than to bring out truth.

It is plain that for the purpose of an effective cross-examination, the cross-examining party must be in possession of some information, suspicion, or other matter, on which to found it. This he will use as a clue to the further evidence desired. Without this guide, the cross-examiner will wander in the dark, and, except by mere accident, will not arrive at any evidence of the smallest importance. The information, suspicion, or other matter forming the ground of a cross-examination, may be possessed quite independently of the examination in chief; or it may be gained in the course of the examination in chief, or cross-examination. And, consequently, it is not necessary that a clue, or all the clues, by which to cross-examine, should be in hand at the commencement of the examination in chief, or cross-examination; they may be picked up in the midst of either.

In a cross-examination, the party examining makes

* See Bacon's Essays, with Annotations by Archbishop Whately, p. 495, ed. 1856. And see below, ch. xi.

use of the witness as, for this purpose, his own witness, as a witness on his own side. And he has a hope and desire that the evidence in the cross-examination will so contradict, vary, explain, or otherwise affect, the evidence in chief, that the result of the whole, or at least part, of the evidence on the two examinations combined, will be favorable to his own side.

A cross-examination intended to destroy, or at least weaken, the evidence given on the examination in chief, very often ends in confirming or strengthening it. The knowledge of this frequent result of cross-examination was probably the ground of Lord Eldon's observation on interrogating a prosecutor: "He was wont to say jocularly, that he had been a most effective advocate for prisoners; for that he had seldom put a question to a prosecutor." * Equal caution was used by O'Connell in cross-examining witnesses for a prosecution: "There is one, the most difficult, it is said, and certainly the most anxious and responsible part of an advocate's duties, in which O'Connell is without a rival at the Irish bar—I allude to his skill in conducting defenses in the Crown Court. . . . . Though habitually so bold and sanguine, he is here a model of forethought and undeviating caution. In his most rapid cross-examinations, he never puts a dangerous question. He presses a witness upon collateral facts, and beats him down by argument and jokes and vociferation; but wisely presuming his client to be guilty, until he has the good luck to escape conviction, he never affords the witness an opportunity of repeating his original narrative, and, perhaps, by supplying an omitted item, of sealing the doom of the accused." †

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* Life of Lord Eldon, by Twiss, vol. i. p. 106.

† Curran's Sketches of the Irish Bar, vol. i. p. 174.

On the trial of O'Coigly for high treason, in 1798, a witness, Dutton, in his examination in chief, proved that a paper found in O'Coigly's pocket-book was in his handwriting. This evidence was, in a singular manner, strongly confirmed by the witness's answers to questions put to him in cross-examination:

"Examination in Chief.

Q. Are you acquainted with Mr. O'Coigly, the prisoner at the bar?

A. I know Priest O'Coigly very well; I knew him at Dundalk, in the north of Ireland.

Q. Are you acquainted with his handwriting?

A. I have seen him write a number of times.

Q. So as to have acquired a knowledge of his manner of writing?

A. Yes.

Q. Look at that paper, and say whether, from your knowledge of his manner of writing, you believe that to be his handwriting?

A. I do believe it to be his writing.

Q. Do you include in that the signature, as well as the whole body of the paper?

A. I believe it to be all the same handwriting, and Mr. O'Coigly's handwriting.

Cross-Examination.

Q. You have sworn you saw Mr. O'Coigly write. Upon what occasion did you ever see him write?

A. On various occasions; I have seen him write letters and notes. I can relate a singular circumstance to you and the Court. There was a poor man of the name of Coleman in the gaol of Dundalk. This man had a wife, and was in great distress. The man's wife used to come to my little shop for tea and bread, and what they wanted; she had no money, and left her husband's watch in my possession for the goods she wanted. Priest O Coigly, I believe, through an act of charity to the poor man, took upon him to have this watch raffled, to relieve the poor man; he took a piece of paper, and put his own name, and after that about a dozen more, and desired me to call upon these people, and they would give me a shilling apiece; he gave me his shilling, and said he would collect more about the town.

Q. Upon that occasion you saw him write?

A. Yes." *

On Horne Tooke's trial for high treason, in 1794, Mr. Woodfall's evidence of the prisoner's handwriting was, in a remarkable manner, confirmed on the prisoner's own cross-examination of him:

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* Trial of O'Coigly (taken by Gurney), p. 135.

"Examination in Chief.

Q. Is this the handwriting of Mr. Tooke? (Showing a book to the witness.)

A. I believe this part (pointing it out) is; but I cannot swear it.

Q. You are not asked to do that.

A. I never saw this entry—I mean merely to say, for my own sake, and that of the jury, that I only swear, that, as far as resemblance of hands strikes me, this is Mr. Tooke's writing. I have seen him write, but not so often as his writing has passed through my hands.

Q. But, however, from writing that you have seen, you are able to form a judgment?

A. I cannot say I am able to form a decisive judgment; but I believe, from the resemblance of hands, it is his handwriting.

Cross-Examination.

Q. Are you sure you have seen me write?

A. Yes.

Q. How long ago?

A. Some years ago; I believe, full 17; the period is a memorable one. I allude to the circumstance of an advertisement for a subscription for the widows, orphans, and aged parents of the Americans who lost their lives at the battle of Lexington.

Q. That was in 1775, 19 years ago?

A. You are perfectly right; it was 19 years ago. . . . The reason why I instanced this case was, because it was a memorable one. You delivered to me, in my brother's counting-house, a copy of the advertisement, upon which I think you wrote the words, 'For the London Packet and Morning Chronicle.' . . . I don't know that I have ever seen you write but once.

Q. The last time you saw me write was 19 years ago?

A. Yes." *

The trial of the Earl of Thanet and others, in 1799, for a riot in court, caused by the attempted escape of Mr. O'Connor (a prisoner just tried for high treason, and acquitted, but not discharged), furnishes another instance in which a cross-examination confirmed the evidence in chief. The name of the witness was Parker:

"Examination in Chief.

Q. Did you see Lord Thanet?

A. I did.

Q. What was he doing?

A. Lord Thanet evidently appeared to me to be obstructing the officers in their attempt to stop Mr. O'Connor.

Cross-Examination.

Q. You say Lord Thanet appeared to you to be obstructing the officers; did you see him do any thing?

A. I saw him resisting with his hands.

Q. What did he do with his hands?

A. The Bow street officers pushed forward; and against one of them it was that he was making resistance.

* Trial of John Horne Tooke (taken by Gurney), vol. i. p. 81.

Q. Pray, which of them?

A. I cannot tell—I do not know which—I did not know either of them.

Q. Can you tell whether it was against either of those two men, or against the Messenger, that he was making that resistance?

A. I cannot.

Q. But you saw him put his hand against one man that was coming forward?

A. Yes, certainly."

Mr. Erskine, the leading counsel for the defense, in his address to the jury, took this notice only of Parker's evidence: "The evidence of Mr. Parker contains nothing which I need detain you with." This slight mention by Mr. Erskine of Parker's evidence occasioned Lord Kenyon, in his summing up to the jury, to make these remarks: "Counsel are frequently induced, and they are justified, in taking the most favorable view of their client's case; and it is not unfair to pass over any piece of evidence they find difficult to deal with. . . . The learned counsel for the defendants, in his remarks on the evidence, totally forgot the evidence of Mr. Parker. If his evidence is to be believed, and I know no reason why it is not, he certainly gave important evidence in support of this charge—that the defendants evidently appeared to be attempting to stop the officers, and assisting the escape of Mr. O'Connor. The learned counsel for the defendants did not choose to deal with this evidence, though he conducted the cause with all possible discretion, ability, and eloquence." *

A cross-examination of a witness often gives rise to a re-examination of him by the side which examined him in chief. One object and effect of the re-examina-

* Erskine's Speeches, vol. iii. pp. 394, 395, 458; vol. iv. p. 63, 3d ed.

tion may be to repair the damage which the cross-examination has done the evidence given in chief. This reparation will take place, partially or wholly, if the effect of the re-examination is to damage in turn the evidence given in the cross-examination, by partially or wholly destroying the force of it, whether through additional facts elicited, or by altering or effacing the evidence given in the cross-examination. An effect of a re-examination may be to confirm the evidence given in the examination in chief. Or, on the other hand, an effect of it may be to confirm the evidence given in the cross-examination.

When a cross-examination has brought out some fact, not contained in the evidence in chief, a re-examination on that fact is, in reality, a cross-examination; and a further examination, following *this* cross-examination, will be a re-examination, and this may confirm the original, or first cross-examination.

The trial, in 1794, of Hardy, for high treason, contains an instance of this, in the following cross and further examinations of the witness, Green:

"*Cross-examined by Mr. Erskine.*

Q. Did you tell Groves that you had sold two or three hundred knives, but desired him to speak low, because the parlor door was open, and your wife was a damn'd aristocrat—did you say so?

A. I will make oath that I did not make use of such an expression as that.

Q. Did you say any thing to him, as if there was any thing improper in selling the knives?

A. No.

Q. I think it right to inform you, that Groves has thought fit to swear, you told him to speak very low, for that your parlor door was open, and

Re-examined by Mr. Attorney-General (Sir John Scott).

Q. To be sure, it is not a polite thing to call one's wife a damn'd aristocrat; what did you say about her?

A. I do not recollect that I said a word of the kind, or threw out any such hint.

Q. Did you say any thing about your wife?

A. I do not recollect, to the best of my knowledge, that I mentioned any thing about my wife.

Q. Did you mention any thing about aristocrat?

A. No; I do not know that I said any thing about aristocrat, or my wife.

your wife was a damn'd aristocrat, and that you did not want her to know that you were selling these knives?

A. I swear I said no such thing; these knives all lay open in my shop; so far from hiding them from my wife, they lay openly in the show-glass, and in the window, for sale.

Mr. Erskine. Did you wish to conceal these knives from your wife?

A. No." *

In relating a story, adherence to the order of time, in which the circumstances took place, is usual and certainly desirable, since a subsequent introduction of an incident, that, in the order of time, should have been noticed before, disarranges the plan of the story, already in the minds of the hearers. So, in putting questions to witnesses, a strict observance of the course of time is of use, as it relieves the jury, or other persons called upon to consider the evidence, from the trouble they might otherwise have, of arranging anew the facts already in their minds.

Of equal use it may be, to call witnesses successively for examination, according to the order of time, of which they are to speak. But this order is not always attended to. The catastrophe of events is sometimes exhibited before the plans, which were laid to effect it. The first scene on Rush's trial disclosed the interior of Stanfield Hall, the murderer's entrance, his discharge of fire arms, and the floor strewn with the dead and wounded. This catastrophe having been detailed by three witnesses, circumstances that happened before were related by witnesses that followed.† So in the case of Tawell, the death of the murdered woman was proved, before proof of the purchase of the poison, which caused her death.‡

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* Hardy's Trial (taken by Gurney), vol. iii. pp. 118, 119, 120.

† See "The [London] Times," of March 30th and 31st, and April 2d, 1849.

‡ See "The Standard," of March 12th and 13th, 1845.

Such a departure from the regular course of time may sometimes be produced by a desire to study and promote the convenience of witnesses in their attendance. But as this inversion of time is not usual, on ordinary occasions, in telling a story, the jury or other persons before whom the facts are detailed, probably expect to hear from the witnesses the tale related in the common way; a way which necessarily saves them the trouble, after hearing the whole evidence, of sorting the details, and fixing them, as to time, in their proper places.

It is true, that on a trial the examination of witnesses is commonly preceded by a statement by counsel of the facts he proposes to prove by the witnesses, and that, in this statement, these facts are usually mentioned according to the order of time in which they happened; yet this course evidently tends to lead the jury to expect to hear the facts related by the witnesses in the same order of time they have heard them in the statement; and when this method is not pursued, the departure from it is likely to confuse the facts in their minds, and occasion them embarrassment. It must, besides, not be forgotten, that the story upon which the jury are to give their verdict, is not that contained in the statement of counsel (which may or may not be proved), but that which is detailed by the witnesses.

CHAPTER X.

OF THE CREDIT OF A WITNESS.

SECTION I. Generally, of the Credit of a Witness.
II. Of a Child's Evidence.
III. Of Motives of a Witness.
IV. Of affecting Credit, by certain Questions in Cross-Examination.
V. Of the former Conduct of a Witness.
VI. Of an Accomplice.
VII. Of a Spy.
VIII. Of the Bankruptcy of a Witness.
IX. Of a Witness's Weakness of Mind.
X. Of a Witness's Demeanor under Examination.
XI. Of different Evidence of Two Witnesses.
XII. Of One Witness's Opinion of Another.

SECTION I.

GENERALLY, OF THE CREDIT OF A WITNESS.

That a witness may be believed, he must say what is credible; and if he does this, and we accept the knowledge, which his evidence offers to us, the principle of our acceptance of it is, our faith in him. "The ground of credit," says Hooker, "is the credibiltity of things credited; and things are made credible, either by the known condition and quality of the utterer, or by the manifest likelihood of truth, which they have in themselves."* And Bishop Sherlock speaks thus of faith, as a principle of knowledge: "In common life we know many things upon the evidence of faith; such are the things, which we receive upon the authority of historical evidence, or upon the report and testimony of credible witnesses; and such influence has this

* Hooker's Eccl. Pol. book ii. s. 4.

principle of knowledge in the world, that there is hardly any thing of consequence, that is not determined by it. There is not a trial, that affects either our lives or our fortunes, the issue of which does not depend upon this principle of knowledge; the judge and the jury not being supposed to have the evidence of their own senses of the facts, which come under their determination." *

On a trial, a witness takes an oath, to speak "the truth, the whole truth, and nothing but the truth." Of truth, Archbishop Whately says,—"Truth, in the strict logical sense, applies to propositions, and to nothing else; and consists in the conformity of the declaration made to the actual state of the case. In its etymological sense, truth signifies that which the speaker trows, or believes to be the fact. In this sense it is opposed to a lie; and may be called *moral*, as the other may *logical*, truth. A witness, therefore, may comply with his oath to speak the truth, though it so happen that he is mistaken in some particular of his evidence, provided he is fully convinced, that the thing is as he states it. Truth is often used in the sense of *reality*. People speak of the truth or falsity of *facts;* properly speaking, they are either *real* or *fictitious:* it is the *statement* that is true or false." † Of *moral* truth, Locke says, it is speaking of things according to the persuasion of our own minds, though the proposition we speak agree not to the reality of things." ‡

We here learn from Locke and Archbishop Whately, what is moral truth: by another Archbishop we are

* Sherlock's Discourses, vol. i. p. 385, 5th ed.

† Whately's Elements of Logic, Appendix, *v.* Truth, ed. 1850.

‡ Locke on Human Understanding, book iv. ch. v. s. 11.

told what may be a disregard of this truth, a matter that some witnesses would do well to reflect on; the disregard consisting not in direct, barefaced falsehood, but in certain inattentions to truth. Archbishop Secker in a sermon on the words, "Lying lips are abomination to the Lord," thus particularizes these inattentions: "In order to apprehend rightly the full extent of this sin [a lie], it must be carefully observed, that not only if we affirm any thing, which we think to be false, but if we affirm it without cause to think it true, we are still deceivers; or though we have cause to think it true, yet if we affirm it more positively, than we have cause; declaring ourselves to know certainly what we only believe, or to believe firmly what we only suspect and guess, the case is but little mended; that not only gross falsities, but more refined ones, artful quibbles and mental evasion, dark intimations and hints, not asserting, but insinuating to others, what at least we doubt within ourselves, all come under the same condemnation; nay, that sometimes an affected silence, and at others truth itself told imperfectly and insidiously, may deeply partake of the guilt of a lie."*

On a trial, or other judicial inquiry, the facts given in evidence are premises, from which a conclusion is to be drawn. That the conclusion may be just, the premises must be true. When, therefore, it is the duty of a jury, or other persons to draw from the facts the just conclusion, the first step in the exercise of this duty is, to acquire a belief of the truth of the facts.

When any one has made a statement of facts, especially if he has spoken under the obligation of an oath, the proper inference is, that he meant to speak the

* Secker's Sermons, vol. v. p. 179, ed. 1771.

truth, unless there is some cause to raise a doubt about it.*

If, from the contradictory statements of a witness, from his manner in giving his evidence, or from any other cause, there is a suspicion he has spoken falsely, and at the same time no motive appears for his doing so, these general reflections relating to his credit, the belief to be given to him, may pass through the minds of the jury, or other persons, whose duty it is to judge of the evidence.

They may, in favor of his speaking the truth, reflect, 1. That a very great part of every person's thoughts is occupied with realities, with things which he really perceives by his sight, hearing, or other sense, in other words, with truth; and whether as a consequence therefrom or not, a great part of every person's discourse is of realities, of what is true; and hence the mind may acquire an aptness or bent to speak the truth. 2. That it is more difficult to invent falsehoods, than to recount realities, more especially if it be necessary to make the falsehoods appear to be consistent with realities. 3. That many persons when sworn to speak the truth, piously regard the oath. 4. That most persons fear shame and punishment; and many are by that fear deterred from committing perjury. 5. That perjury is seldom committed in mere wantonness, without some sufficient motive for it.

It is not to be doubted, but that many a man, like a Christian martyr, testifying with his blood, would prefer torture or death to perjury, and herein literally obey the noble exhortation of the Roman: *

> "Be brave, be just; and, when your country's laws
> Call you to witness in a dubious cause,

* Ovid. Trist. lib. iii. El. x. 35.

Though Phalaris plant his bull before your eye,
And, frowning dictate to your lips the lie,
Think it a crime no tears can e'er efface,
To purchase safety with compliance base,
At honor's cost a feverish span extend,
And sacrifice for life, life's only end." *

There is, nevertheless, often a propriety, or a duty, in doubting whether a witness speaks the truth. To doubt of truth is not to convict of falsehood; it may have a directly contrary effect; its result may be, to confirm the witness's testimony. And where the doubt exists, it need not arise from a suspicion, that the witness has willfully spoken an untruth. He may very innocently have said what he believed to be true, although in reality it is not so; he was himself, perhaps, deceived in his perception of a particular thing, he did not see or hear what he thought, and what he says, he saw or heard; or, supposing his original perception was correct, his remembrance of what he saw or heard may be imperfect.

"It is one of the commonest mistakes to suppose, and assert, that some fact has been *seen*, which was not seen at all, and often could not have been seen; the fact being simply *inferred*. A witness may swear that he saw defendant knock the plaintiff down; it is a fact which admits of being seen, and may be testified to completely. But should the fact, sworn to, be only a little more complicated, and some of its constituent elements lie beyond the field of vision, the testimony becomes proportionately fallible. For example, we cannot accept the evidence that witness saw defendant *going* to knock the plaintiff down; that is pure inference; it may be the natural interpretation every man would put upon what was seen, but it may nevertheless

* Juvenal, Sat. viii. 80.—GIFFORD

be wholly erroneous, no such intention having existed in the defendant's mind." *

"Seeing is, in all cases, believing; but in all cases we must assure ourselves of *what* we have seen, carefully discriminating it from what we have not seen, but only imagined, and carefully ascertaining whether the facts seen by us are all the facts then present. It is by no means easy to see accurately any series of events; nor, when under any strong emotion, is it easy to prevent the imagination from usurping the place of vision." †

A witness not unfrequently himself impairs his credit, by unawares dropping something, which is irreconcilable with what he has before said:—

"*Falstaff.* But, as the devil would have it, three mis-begotten knaves, in Kendal green, came at my back, and let drive at me;—for it was so dark, Hal, that thou could'st not see thy hand.

Prince Henry. These lies are like the father that begets them; gross as a mountain, open, palpable.

Falstaff. What, art thou mad? art thou mad? Is not the truth, the truth?

Prince Henry. Why, how could'st thou know these men in Kendal green, when it was so dark thou could'st not see thy hand? Come, tell us your reason; what sayest thou to this?" ‡

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* Blackwood's Edin. Mag., Oct., 1860, p. 382.

† Blackwood's Edin. Mag., Oct. 1860, p. 395.

‡ Henry IV., Part i., A. ii., S. 4.

SECTION II.

OF A CHILD'S EVIDENCE.*

When a child is a witness, it will be natural to receive its evidence with proper caution. A child may be very quick to perceive aright some things which it sees or hears; but, from want of knowledge or experience, it may perceive imperfectly other things it sees or hears. In seeing, it may mistake one thing for another; and in hearing, may misunderstand words, and for those which it heard may substitute others of a very different meaning. And there is danger lest a child should borrow somewhat from its imagination, or from what it has heard other people say, and so amplify facts beyond their just measure. But a child is naturally artless, and means to speak the truth.

It is not, however, to be forgotten, that a child is open to be beguiled, biased, influenced, or intimidated by the false representations, or the promises or threats, of designing people. But hesitation, confusion or embarrassment in telling its story may not be the effect of its doubt about what it saw or heard, or its wavering between inclination to speak truth or falsehood; but may merely and naturally be the effect of timidity or

* ["Children and servants are remarkably Herodotean in their style of narration. They tell every thing dramatically. Their *says he's* and *says she's* are proverbial. Every person who has had to settle their disputes, knows that even when they have no intention to deceive, their reports of conversation always require to be carefully sifted. If an educated man were giving an account of the late change of administration, he would say, "Lord Goderich resigned, and the king in consequence sent for the Duke of Wellington." A porter tells the story as if he had been hid behind the curtains of the royal bed at Windsor. "So Lord Goderich says, I cannot manage this business, I must go out. So the king says, says he, well, then, I must send for the Duke of Wellington, that's all."—*Macaulay, Essay on History.*]

bashfulness, or of its not fully understanding the words, or the drift, of a question put to it.

Whenever any one gives evidence upon oath, the knowledge by him of the importance it may be in its consequences to the person, for or against whom it is given, is, in addition to the sanctity of the oath, some security against his bearing false testimony. Of this importance, a child may, in many cases, be a very inadequate judge.

One further remark must be made on a child's evidence. However humiliating to human nature, however appalling, the fact may be, true it is, and it must not be lost sight of, that a child, even of tender years, is capable, not only of committing perjury, but the crime, than which there is none greater,—murder; as in the instance related by Sir Michael Foster, of a boy of ten years of age convicted at Bury Assizes in 1748, of the murder of a girl about five years old.*

SECTION III.

OF MOTIVES OF A WITNESS.

Motives are a fruitful source of suspicion against a witness; some stronger than others, and attended by corresponding effects. Some may be powerful enough to lead to perjury, although not in its full extent, yet so far as to dilute or color the evidence, to dress it up to suit a particular purpose.

A motive to go so far as direct, unmitigated, perjury, may be, that the witness's testimony, if believed, will redound greatly to his own personal advantage; as in the case where, being a party to a suit, he will acquire wholly or mainly, through his own evidence, an estate, money, or other advantage.

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* Foster, 70.

Other motives in a witness to perjure himself may be—a present bribe, or a present promise or expectation of one; the passions envy, spite, revenge; the desire to shift punishment from the witness himself on to another.

There are besides motives of a less degenerate kind than others, but which ought, nevertheless, in particular cases, to arouse some suspicion against a witness. These may be called influences; influences arising from the affectionate or friendly relation, in which the witness stands to the person, for or against whom he is a witness. The relation may be, of husband and wife, parent and child, brother and brother, master and servant, bosom-friend and bosom-friend; "there is a friend that sticketh closer than a brother." These influences may prevail to conceal truth, or overstep its boundary.

SECTION IV.

OF AFFECTING CREDIT, BY CERTAIN QUESTIONS IN CROSS-EXAMINATION.

To destroy or weaken the credit of a witness is very commonly attempted through his cross-examination, when the witness's own answers may injure his credit. To impair the credit of a witness, the following questions have been put to him in cross-examination:—

Whether he has ever been charged with theft:

Whether he has ever been in gaol; how often; how long ago; what it was about; whether about stealing: whether he was ever in custody on any other charge:

Whether there was not a complaint made against the witness for fabricating a will:

Whether the witness (a soldier) had ever been punished since he had been in the regiment, and what sort of punishment he received:

Upon what occasion the witness (a servant) was discharged by his master:

How often the witness had been a witness in a court of justice; upon what occasions:

Whether in any former case the witness applied to be rewarded for his evidence; as for a place under government:

Whether the witness had not talked about the expectation he had of a reward after the trial should be over:

Whether the witness ever received any letter, offering her any advantage, in case she would appear as a witness against the prisoner:

Whether the witness, an accomplice with the prisoner, and giving evidence for the Crown, has obtained any pardon, or has had any offer made to him of a pardon, or is in expectation of a pardon, on condition of giving evidence against the prisoner:

Whether the witness, an accomplice with the prisoner, and giving evidence for the prosecution, understood on his previous examination before a magistrate, he was to be admitted a witness for the Crown, and to save his own life:

Whether the witness had ever received or been offered any thing to withhold her evidence:

Whether the witness had ever uttered any declarations of enmity against the prisoner; whether the witness had said he would be even with him:

Whether the witness had not declared, he would hang the prisoner.

The particular reasons, on which some questions of this kind are founded, may be here mentioned:—

A witness having made a deposition before a magistrate, and it being on the trial shown to him, he is asked, whether it is his, and on his answering yes, the deposi-

tion is read; and it is read, Chief Justice Tindal told the jury, "in order to show some contradiction between his evidence before the jury, and the evidence that he gave before the magistrate—a very proper mode of testing the credibility of a witness, or the correctness of his memory, either the one or the other, according to circumstances." *

So in another instance, on the same trial, where the deposition of the witness was read, the same learned judge told the jury, "The object of putting in this deposition is a very proper one—it is to subject the credibility of the witness to your examination." In this instance the witness's evidence on the trial contained more than his deposition did; it contained a conversation, which the deposition omitted; and on this omission, which the witness now accounted for, the judge made these remarks to the jury,—"He does not give any account in his deposition of the conversation, which in his examination here he alleges to have passed. He had a reason, as he alleges, for it—whether it is a good reason or a bad one, it is for you to say—it is, that he was not examined so particularly upon this occasion as he was in court; that he was told by Mr. E., who was the gentleman examining him, to state what he knew about F. [the prisoner], and that is the reason he gives; and as this was a statement, that was not made by F., and he could not say that F. heard it, he in his own mind thought, that it was not included in the general direction, that he was to state what he knew about F. That is the reason he gives. It is an important piece of evidence, and therefore one cannot but wonder, that so important a piece of information, as that conversation, should have been omitted at the first period of his

* Frost's Trial (taken by Gurney), pp. 220, 702.

examination. Whether he is speaking truly or falsely in giving it now is under your judgment. He assigns the reason for it, namely, that he was not asked; but that if he had been asked, he should have stated it. He says, 'I was not asked, I was not examined so carefully, as I was here.' Whether that is a satisfactory reason for the omission or not, judge you for yourselves." *

Again, a witness for the crown was, on his cross-examination, asked this question: "You have been somewhat serviceable in the course of this prosecution?" Referring to this question, Chief Justice Tindal told the jury: "That is an inquiry often asked, and properly asked, of a witness, in order to see whether he has mixed himself up as a busybody, or partisan, going about and getting witnesses for any cause in which he is called; because that would weaken, in some degree, the confidence you might otherwise have in him." †

A witness, "a quarryman," to a question on his cross-examination, said he had been in gaol six or seven years ago, for three months, for stealing a bit of coal. And the Chief Justice Tindal told the jury: "Here is a question which is very often asked of witnesses upon cross-examination, when there is any intimation given that they have disgraced themselves, on former occasions, by acts of dishonesty and theft; and it is for you, who are the judges of the credit due to the witnesses, to say how far the circumstance of his having stolen this bit of coal, and being in prison for it, weakens the proper degree of reliance which you would otherwise place upon him. You are, from your experience and knowledge of the world, and of the

* Frost's Trial (taken by Gurney), pp. 305, 308, 725. See Way v. East, 2 Drewry, 69.

† Frost's Trial, pp. 537, 724.

occasions upon which sometimes these small thefts are committed by persons in the witness's condition of life, to say how far it is, or not, incompatible with their afterward becoming trustworthy, when they are called upon their oath to give an account of any particular transaction. It is, undoubtedly, a discredit to any man, because it is a great breach of law and morality. It is not, however, that kind of breach which does by law prevent his giving evidence in the witness box. It is not an offense, which in its own nature points to, or is grounded upon, the commission of falsehood; it is not as if he had been found guilty of the crime of perjury, in which case he could not afterward have been examined. It is an act of very great dishonesty and knavery; but how far it ought to impeach the value of his testimony, when he is called upon subsequently to give an account of a different and important transaction, you will determine for yourselves." *

On the trial of Frost for high treason, in 1840, Harford, a collier, a witness for the crown, said, in his examination in chief, that, on the evening of a Sunday, a mob came to his house, and, by their compulsion, he joined and went along with them, and brought with him a sword he had in his house, and that early the next morning he made his escape from them. On his cross-examination, he said he was apprehended in his house by the magistrates, and kept in custody at the Union Workhouse at Newport thirteen days, on the expiration of which he was taken before the magistrates and examined; there was no charge made against him; and he said what he had to say against Frost. On his cross-examination he also stated, that, while in

* Frost's Trial (taken by Gurney), pp. 287, 288, 715, 716.

custody, he told the master of the workhouse what he could say against Frost; that when he made this communication, he knew he was in custody upon a charge of taking a part in the riot; that he had been twelve days in custody when he made that communication; that he did not go and tell the magistrates about Frost in order to get his own liberty; that he expected to be freed from the charge himself, when he told the magistrates about Frost; that when he had given his evidence before the magistrates, he was at once set at liberty, and went home; and that he never feared he should be hanged for being connected in any way with the mob, because he had done nothing to be hanged, or to go to prison for. In the cross-examination of this witness there appears to have been an endeavor to prove him to be an accomplice with Frost, but the attempt certainly failed. In summing up to the jury, the Chief Justice Tindal made these comments on the cross-examination: "The ground upon which this cross-examination is submitted to you is to diminish the weight which, but for it, must have been attached to the evidence given by this man: namely, that he was in prison upon a charge of being concerned in the very transaction which we are now inquiring into; and therefore that he must be looked upon as an accomplice in the transaction, and liable to the same objection to which a person, who has been partner in guilt with the man who is under trial, is at all times subject. The answer that he gives to that is, that all the share that he had in it was, that he was there with a sword in his hand, but that it was against his will. And he further undertakes to tell you that he was not afraid that any thing would happen to him, because he thought, when he had explained the circumstances, he should go free, and not be dealt with as a participator in the acts of

criminality. It is often the case, where people think they may serve themselves, by giving evidence on the part of the Crown against another individual with whom they have been partaking in the common guilt of the transaction under investigation, that for the purpose of saving themselves, rather than of stating the truth, they make out a stronger case against the prisoner, and more favorable to themselves, than the real truth will warrant. Such evidence is at all times admissible before a jury, and it is their province, according to the degree of confidence which they feel they can repose in such a witness, to estimate his evidence; and they are principally governed in that by seeing how far the testimony of such person is corroborated by that of any other witnesses, who are called to prove the same transaction, and who are free from any such objection." The Chief Justice, having made these remarks on this part of the witness's cross-examination, continued: "But his testimony is also sought to be impugned upon another and a different ground: namely, that he does not come forward immediately at the time, when he is first put into prison, with this account; but that he remains in prison for the space of twelve days before he gives any account of the transaction. And you are, therefore, desired to bring this matter before your minds, and to say how far you think the witness, under such a state of circumstances, is a witness of credit, or not. They say it affects his credit, and put it to you as a ground upon which you are not to believe him at all. I have stated the objection on the part of the prisoner's counsel. The answer the man himself gives to it is, that he never considered himself as personally liable to an indictment, because he thought that when he stated the whole of his story: namely, that he was forced out

of his house with his sword, and made his escape as soon as possible, he should be treated as an innocent man, and not as a criminal. That is the question between the parties. You must estimate the value of this man's evidence according to the best of your judgment and discretion." *

With regard to a difference between a witness's deposition before a magistrate, and his evidence in court, it is certainly very remarkable that a policeman will often, in court, give his evidence as nearly as possible, word for word, agreeing with the language in his deposition. Probably the main cause of this exactness ought to be attributed, not to memory alone, but also to practice and habit. For, generally speaking, certainly, this nicety is not to be expected in testimony borne at different times, perhaps after an interval of several weeks, first in a deposition before a magistrate, and afterward in court. Speaking of the re-examination of the same witnesses, on an appeal against a conviction under an excise information, as were examined on the original hearing, Lord Ellenborough said: "Supposing they were confined, as far as might be, to the same facts, yet their re-examination would always, to a certain degree, be productive of fresh evidence, as it could not be supposed that any witnesses could give their testimony precisely in the same form and substance as upon a prior examination." . . . . "Indeed, upon the reason of the thing, evidence, if it be to be heard again from the mouths of the same witnesses, cannot be precisely the same; differences must necessarily arise from a varied recollection of the witnesses." † That a certain dissimilarity in evidence is

* Frost's Trial (taken by Gurney), pp. 354, 737.

† 3 Maule and Sel. 140, 143.

in such cases natural, and almost unavoidable, is a point not to be forgotten in determining the credit of a witness whose deposition, and subsequent evidence in court, do not perfectly agree.

SECTION V.

OF THE FORMER CONDUCT OF A WITNESS.

The credit of a witness is generally supposed to be injured by his having before, whether recently, or even some years back, been guilty of, or charged with, some punishable offense. With the view of damaging his credit, a witness (as before mentioned) is constantly asked, in his cross-examination, whether he has ever been charged with this or that offense; whether he has even been in gaol, and if so, what it was about; and other questions of the like kind.

Assuming that this distrust of the witness rests upon the principle, that every man's nature is so corrupt that, under temptation, he is capable of committing perjury; and that the particular crime the witness has been guilty of, or charged with, deteriorated his nature to such a degree as to incline him to yield to the temptation to perjure himself; it may be inquired how far this distrust is rightly founded.

It will be admitted that, under temptation, any man is capable of committing perjury. But this inherent corruption in man is not greater in the witness than in any one else—it furnishes no reason to distrust him more than another. And supposing a man guilty of a crime, as theft, to be a witness, and to bear false testimony, it does not follow that an increased corruption of his nature by the theft is the cause of the perjury; he may be a perjured man,

because of the corrupt nature of which all men partake; he might have perjured himself, although he had not been guilty of the theft.

The degree of deterioration caused to the witness's nature by his former crime may, perhaps, be rightly measured by the crime itself. For there are degrees of offenses—a pickpocket may not be prepared to commit perjury.

Supposing the witness's nature was by his offense once deteriorated enough to dispose him to perjure himself, it is important to inquire whether it is so still. There is such a thing as repentance, whereby we forsake sin; and the effect of repentance in him may be to reinstate him in his former moral condition, liable indeed to commit perjury, but not more so than any other man. Length of time since the offense, and intermediate good conduct, may be evidence of such repentance. Dr. Johnson relates of Shakspeare, that "he had, by a misfortune common enough to young fellows, fallen into ill company; and amongst them, some that made a frequent practice of dear stealing, engaged him, more than once, in robbing a park that belonged to Sir Thomas Lucy, of Charlecote, near Stratford." * If Shakspeare had been put into the witness box, bearing "his blushing honors thick upon him," would not his contemporaries have believed him? †

But however in theory a person who has committed a crime, and thereby lost his good name, may be believed, and ought to be believed; yet, certainly, in some cases, the difficulty may be insurmountable when

* Dr. Johnson's Account of the Life of Shakspeare.

† [Lamartine, when in the zenith of his popularity, offered himself as a witness, and was rejected on account of his having, in his youth, been convicted of theft.]

it is required practically to put faith in what he says, and to act upon this belief. If the witness, guilty of a crime, comes from a line of ancestors notorious for bad character—as thieves, or rogues of any kind—he will be very much in the situation of the foxes described by Gay, whose good names were irretrievably gone, who were past belief, owing to their own trespasses and those of their ancestors. The advice of the dying sire to his numerous race, standing around him:

> "Would you true happiness attain,
> Let honesty your passions rein;
> So live in credit and esteem,
> And the good name you lost redeem,"

was by his offspring admitted to be good, but pronounced to be useless:

> "The counsel's good, a fox replies,
> Could we perform what you advise.
> Think what our ancestor's have done;
> A line of thieves from son to son:
> To us descends the long disgrace,
> And infamy hath marked our race.
> Though we, like harmless sheep, should feed,
> Honest in thought, in word, and deed;
> Whatever hen-roost is decreased,
> We shall be thought to share the feast.
> The change shall never be believed;
> A lost good name is ne'er retrieved." *

SECTION VI.

OF AN ACCOMPLICE.

When an accomplice, or partner with another, in some offense, which they commit, is allowed to be a witness against his associate, why is not implicit belief to be given to his testimony? Why is there to be a

* The Fox at the Point of Death.

doubt whether his evidence ought to be believed? As to what actually took place before, and at the time of, the commission of the offense, it is clear the accomplice may have had full opportunity of seeing and hearing all that occurred. And to swear falsely, to bear false witness, is a very different offense—different both in kind and in degree of guilt from many others. Then, assuming that to bear false witness is, in degree of guilt, more heinous than some other offenses are; unless we are prepared to say, that he who commits the less heinous offense, will also commit the greater, it does not follow that if a man is guilty of an offense less than perjury, he will go further and incur the guilt of perjury itself.

It is well known that the inward monitor, conscience, "makes cowards of us all," in the sense that it often deters from the commission of crime; and where the cowardice is based on no higher or better principle, it is often grounded on the fear of punishment. The man who picks a pocket, may hesitate and forbear to rob with violence; and the robber with force may hesitate and forbear to stain his hands with blood. But this reasoning from ascent in guilt does not apply where the crime committed is, in degree of guilt, equal to, or greater than, perjury—as high treason or murder. A man who will take a part in high treason or murder, will probably not scruple to perjure himself.

In all cases, a principle on which to doubt the truth of an accomplice's evidence against his companion, is temptation to swear falsely. To save himself, an expectation of pardon for his guilt, and of a reward for his evidence, or of the pardon alone, may be a sufficient temptation to him.

"The long conniving damsels seek
To save themselves, and would transfer
The guilt—the shame—the doom—to her:
Concealment is no more—they speak
All circumstance which may compel
Full credence to the tale they tell." *

If an accomplice give evidence against his associate, with the expectation of thereby securing pardon to himself; if this expectation be his only motive, this motive, standing alone, offers but a slight reason for disbelieving the witness. The hope of pardon is consistent with contrition for his guilt: and his temptation to give evidence against his companion is the less, inasmuch as his own testimony will necessarily involve himself in that companion's guilt; and the pardon he expects cannot, he knows, efface the stain, which the offense, of which he owns himself to be guilty, lays on his character.

If, in addition to the pardon, there be the assurance, or even the hope, of reward, this assurance or hope necessarily taints the evidence, and creates a suspicion it may not be true.

Besides the open temptations of pardon and reward, temptations about which the accomplice makes no concealment, there may be a secret temptation, one which hidden in his own breast, he keeps to himself, that may move the witness to forswear himself; this may be ill-will toward his companion. And the possibility of this or any other bad motive, alone renders it imperative to receive with caution the evidence of every accomplice.

If it be difficult, as of necessity it is, to inquire into and learn the secret motives of a witness, as a guide to determine the belief which ought to be given to him,

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* Parisina, St. viii.

yet there are several plain ways, by which his veracity may be tested. It will be easy to see, whether his evidence is consistent in all its parts, and whether any other witness contradicts him in the main, or any material, fact; and whether his evidence of the main, and every material, fact is confirmed by the testimony of another witness. Where there is such freedom from contradiction, and such confirmation, by other witnesses, and no sufficient motive to swear falsely appears, it may be hurtful to justice to withhold belief from the evidence of an accomplice.

Several witnesses on the trial of Colonel Despard, in 1803, for high treason, were accomplices with him; and Lord Ellenborough in summing up to the jury thus spoke, in general terms, of evidence given by accomplices:—Their testimony is to be received and acted upon with an attentive and scrupulous consideration of its merit and value; in each particular instance, they come sullied with some degree of contamination (not all, indeed, in an equal degree); contaminated, however, in some degree, by a participation in the very crime they impute to others; but the witness who comes thus *primâ facie* contaminated, may be so confirmed by the consistency and clearness of his own narration, and still more by its conformity to, and coincidence with, the substance of the testimony delivered by others, not likely to have conspired with him in the crime itself, or to have had the means of concerting and colluding with him as to the matter of his testimony, that he, a person originally standing under some degree of doubt and suspicion from the nature of his situation, and from the quality of his testimony, becomes, at last, entitled to be believed in the fullest manner.*

* Trial of Colonel Despard (taken by Gurney), p. 214.

On the trial of Forbes and others, in 1823, at Dublin, for a conspiracy to create a riot, and for a riot, John and George Atkinson, two of the witnesses for the prosecution, were accomplices; and on the credit to be given to them, and to accomplices in general, the Chief Justice in his summing up told the jury,—"Every accomplice is in law a competent witness; the judge is bound to receive him; but whether he is credible is for the jury alone. In determining that question, various circumstances must be taken into consideration. In the first place, the man, who thus comes forward, proves himself to be, in a certain degree, destitute of moral sense, by admitting himself to have been a participator in guilt. In estimating the credit of a man, we are naturally led to inquire what is his moral character; and if you find that exceptionable, it will make you cautious in relying upon his evidence. But in following this principle to its practical results, it will be necessary to recollect the nature of the crime, in which the witness admits his participation. A man guilty of an atrocious offense, whose hands have been stained with blood, or whose heart has been polluted by treason, is a competent witness; but unless satisfactorily corroborated, a jury will seldom act upon his testimony. However, if the crime be of a less dark complexion, the inference to be deduced from his admission of being concerned in it, will be proportionally weakened. . . . . There is another source of discredit in every case of an accomplice, which a jury is bound to take into consideration; I mean the interested motives, which may induce such men to come forward—sometimes perhaps to escape punishment—to save their lives—to shield themselves from prosecution—or to entitle themselves to rewards. In all these cases, a jury should act with such jealousy, as almost to reject their evidence, unless

satisfactorily corroborated by other and more unimpeachable witnesses. . . . . Upon this subject of the credit which may be given to accomplices, it is right that I should make another observation. There never, it must be admitted, existed any man so bad or depraved, but that he might possibly speak the truth; and, therefore, when a witness gives evidence in a court of justice, it is not the true question, whether he is or is not a credible person, for that is only part of the means of forming a judgment upon the real question—which is, whether what he states be true; because it is possible that an incredible man may disclose the truth. The way to discover whether he has done so or not, is to try whether his statement be substantiated by other evidence, either of the facts, to which he has deposed, or of such a state of facts, as is inconsistent with any thing but the truth of what he has sworn." *

It may not often, yet it may sometimes, happen, that an accomplice appears under the favorable circumstances noticed by Lord Ellenborough, in summing up to the jury in the case of Codling, Reid, and others, tried in 1802 for sinking a vessel with intent to defraud the underwriters. The principal witness against the accused was a seaman of the name of Cooper, the man who actually bored the holes, through which the water entered the vessel and sank her. Lord Ellenborough thus spoke of him: "The first witness, and upon whose testimony most materially the case of the prosecution depends, is Thomas Cooper. You are to take him now to be not only an accomplice, but a principal in the commission of the crime; a person to whom, although competent, you would not be disposed

* Trial of Forbes and others (taken by Greene), p. 355.

to give credit; nor ought you to do so, unless he is supported and confirmed by other testimony; but he does stand before you in a different situation, from almost any other person I ever remember presented to a jury as an accomplice; for he is not only not contradicted in any one particular, by any of the vast body of evidence collected from on board his own ship; and every person has been called to you, who filled any function in it, excepting the prisoners Codling and Reid; he not only is not contradicted by any of them in the course of their examination, but is not attempted to be contradicted by any witness brought to disparage his general credit or character; nor do any of the circumstances, adduced on the part of the defendants, reflect either discredit upon his character, or discredit upon the story he has told; and in the very manner of his statement there is something, which gives a degree of credit to his statement and story. Therefore, though he stands before you an accomplice, and though he is the very hand that effected the destruction of the ship, he is as little tainted by the commission of such a crime, as almost any accomplice, that ever presents himself in a court of justice. No one person has been called to say, he would not believe him on his oath; nor is there any motive, beyond the promise of looking after a better berth or better situation for him, that seems to have been thrown out as a lure to him, to induce him to act the part, which he assigns to himself in this wicked transaction." *

* Trial of Codling and others (taken by Gurney). p. 208.

SECTION VII.

OF A SPY.

Suppose a witness to have been a spy, one who watches the words and actions of others, for the purpose of informing and giving evidence against them. If this man is accidentally, or, from previous information or suspicion, is designedly, present during the plotting of some offense, whether against the State or Government or individuals; and from his dislike of the meditated conspiracy, and to further the ends of justice, he conscientiously remains to learn the views and secrets of the associates in the plot, with the fixed design to stop and counteract it, or, if unable to do this, at least to aid in punishing the conspirators; this conduct may be justifiable, both legally and morally; and it will follow, that, if to convict the parties to the plot, he gives his evidence against them, the mere character of spy ought not to prejudice, or stain the credit of, the witness. To this man no guilt of the plotted offense attaches.

Another description of spy may be a man, who has undesignedly been present at a plot, and, by the inducement or example of others, been tempted to join in it; or a man who has been even one of the original framers of the plot: and either of these men, whether from seeing the proceedings may lead him further than he intended, or from some quarrel with his companions, or from repentance, or other cause, may secretly and unknown to the others withdraw from the confederacy, and from that time resolve to watch their proceedings, with the view to be a witness against them; and with this intent continue to attend at their meetings and take notes of, or carry away in his memory, what

he sees and hears. This man stops short in his career of guilt as a conspirator before it is perfected.

But as all kinds of spies, meditating to inform, are naturally in some degree disliked, there is no doubt in each of the men before-mentioned, a something, which affects and endangers his credit. Yet it need not in either of those instances utterly destroy it. For it is plain the man has had the very best opportunity of seeing and hearing what was done and said by his associates. And to what extent his credit is hurt, and how far he is to be believed, may be learnt from considering, whether the different parts of his story are consistent with each other, whether he is contradicted in any material fact by other witnesses, whether there is a probability of truth in what he says. If his story is consistent, if he is not contradicted in any material fact, and *à fortiori* if he is confirmed in material facts, by other witnesses, and if probability supports his story, it may be right to believe him. And although, in the course of his examination, there is some hesitation or confusion in his answers, shame in his countenance, or embarrassment in his demeanor, yet it should be recollected that, excepting the shame, each of the other defects is often seen in the most honest and honorable witness; each is the natural, and often the inevitable, fruit of the wily and ensnaring questions put to the witness by a skillful adverse interrogator. And the shame itself is a token favorable to the witness, inasmuch as it shows he feels himself degraded by the character he bears of spy; and to be void of all appearance of shame would argue a want of self-respect under an imputation of dishonor.

On the trial of Hardy for high treason in 1794, Lynam, one of the witnesses for the Crown, gave in evidence that he was a member of the London Corres-

ponding Society, and was a delegate of one of its divisions; that he attended at many of the meetings of the delegates, and, as was the practice of other delegates, he as one of them took down in writing much that was said and done there, for the purpose of communicating what had been transacted at the meeting of delegates to his division of the society; and, while still a delegate and attending the meetings, he, on consulting with a friend, made by his advice reports from time to time of the society's proceedings, not to a magistrate, but to a person, to whom through his friend he was recommended to give the information; such reports being copies of the reports he made to his division of the society: what he saw and heard was taken down, both to be reported as a delegate, and for the purpose of giving information to the person, to whom he had been recommended to give it.

Erskine, in his defense of Hardy, stigmatised Lynam as a spy, charged the evidence with inconsistency, and objected to it, that part was from notes, and part from recollection; and that the witness had not in his notes taken down the words he heard, but only the substance of them; the impassioned advocate exclaiming,—"O excellent evidence! The substance of words taken down by a spy, and supplied, when defective, by his memory. But I must not call him a spy; for it seems he took them *bonâ fide* as a delegate, and yet *bonâ fide* as an informer; what a happy combination of fidelity! faithful to serve, and faithful to betray."

On the same witness's evidence, Lord Chief Justice Eyre, in summing up to the jury, made these remarks, —"It has been a fatiguing work to go through these broken accounts of the transactions of the society from this man's notes, and the accounts must necessarily be somewhat imperfect; but upon the whole they carry

with them very great marks of authenticity; and with respect to those facts, which can be clearly collected from them, they seem to be very weightily proved; and I cannot imagine that the evidence of this man is shaken in any particular whatever, from the mere circumstance of a man, otherwise of credit, choosing to give information of proceedings, which he conceived to be dangerous to the constitution of the country; to say that that is to affect his credit, is not a thing to be asserted in a court of justice, nor fit to be encouraged by a jury. Wherever men of this description give evidence, and they give their evidence in a way which is fairly open to observation, the circumstance of their coming to give their evidence in this manner will have its weight; but if their evidence in other respects is uniformly consistent and probable, and is not impeached, it is not enough to say, that this man went into this society on purpose to inform the magistrate of what was passing. It is extremely necessary that should be done; it is the duty of magistrates to watch over the public peace, if anything material is going forward by which the public peace of the country may be affected; it is the duty of the magistrate to use all proper means to bring these proceedings to light, in order that they may be brought to the test of the law; and he would be criminal if he did not use those means." *

On the trial of Colonel Despard for high treason in 1803, during the trial a witness, Windsor, had been considered, both by the Crown and the prisoner, as an accomplice with Despard. What Windsor had done was this,—He, on invitation by one of the conspirators, joined in the plot, and immediately communicated the

* Trial of Hardy (taken by Gurney), vol. iii., pp. 12, 289; vol. iv., p. 387.

object of it to a person of the name of Bownas, from whom he received advice as to his future conduct; and on that advice he attended several meetings of the conspirators, and ultimately offered himself as a witness against them, and disclosed to certain magistrates the whole extent of the treason. Lord Ellenborough, in his summing up to the jury, distinguished Windsor from an accomplice; and the character his lordship attributed to him answers the description of a spy; and he thus cautions the jury about their reception of the evidence of a witness of this nature:—"There is a class of persons, which cannot properly be considered as coming within the description, or as partaking of the criminal contamination, of accomplices; I mean persons entering into communication with the conspirators, with an original purpose of discovering their secret designs, and disclosing them for the benefit of the public. The existence of such original purpose on their part is best evinced by a conduct, which precludes them from ever wavering in or swerving from the discharge of their duty, if they might otherwise be disposed so to do; as in the case of Windsor, who bound himself to his duty by an early communication to Bownas, and received from him directions, as to the steps which he should afterward pursue. If he entered into and continued in the apparent prosecution of the purposes of the conspiracy, with this view and object, he is not an accomplice; although, perhaps, a great degree of objection or disfavor may attach to him on other grounds; for certainly no person of very delicate feelings (however necessary it may be in some cases) would choose to go on from day to day, apparently forwarding the purposes of a conspiracy, in order that he might afterward disclose it, and bring the parties concerned in it to justice; but still, whatever may be the merit or

demerit of this species of conduct on other grounds, it is not, taking the fact as Windsor has stated it, the case of an accomplice." And at the close of his summing up, Lord Ellenborough told the jury,—"If Windsor entered into this scheme, with the original purpose of making a timely discovery of the mischief; and that he did so, his uncompelled discoveries appear very strongly to indicate; I say he is not strictly an accomplice; though the concern he had in the business, in continuing so long, and mixing so intimately [in], and forwarding with so much apparent good will and alacrity, the objects of the conspiracy, certainly exhibit him to you, as a person of no very delicate character and feelings. And if the testimony he gives had [not] been materially confirmed, as it has been; and if his general credibility as a witness upon oath had also been impeached with effect; I should certainly have advised you to pause upon the testimony of this witness, and to think well of the degree of credit you ought to give it, before you believed it." *

Most persons will admit, that a magistrate, in the exercise of his duty to watch over the public peace, may, with honor to himself, employ a spy upon the actions of conspirators against the State. Cicero told Catiline to his face, that at home and abroad, by day and night, he was beset by spies.† In such a case, the wel-

* Trial of Despard (taken by Gurney), pp. 69, 215, 258.

† So long as there shall be any one, who shall think you ought to live, you shall live; but live as you do now, surrounded by my emissaries, resolved you shall do nothing to injure the State. The eyes and ears of many, without your perceiving it, shall continue to follow and watch you. And what do you now any longer expect, Catiline, since neither the darkness of night can veil your open-air assemblies, nor the walls of a house confine the voices of your conspiracy? . . . . There is nothing you plot, nothing you do, nothing you think of, that I not only do not hear, but even do not see, and clearly understand.—*Orat. in Catil.*, i. 2, 3.

fare, perhaps safety, of the State justifies the magistrate, and with him his instrument, the spy: the unsullied honor of the former purifies the function of the latter.

There is yet another kind of spy; the mercenary one employed, not for public, but for private purposes; the man who will haunt society, treacherously insinuate himself into the confidence of others, listen at doors or thin partitions, or any way play the eaves-dropper, peep through key-holes, climb ladders to look in at windows.

These men are much to be feared.* Men of this description were those whom Tacitus mentions, and who, in conspiring the death of Sabinus, contrived a way, by which others, intended to be witnesses against him, might overhear a conversation between him and the conspirators.†

A spy of this kind will do all this or more for lucre's sake; on hire before hand; for money paid down, or promised before he begins his work. This man's testimony is hardly to be believed under any strength or fullness of consistency in his story, or probability in it; and any attempt at corroboration of it by others will demand a severe scrutiny. His bargain for such kind of service and reward is a proof of the man's coarse feelings and unscrupulous mind. And

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* "They search the secrets of the house, and so
Are worshiped there, and feared for what they know."—
DRYDEN. *Juvenal*, iii., 113.

† "The conspirators held it necessary that the conversation of Sabinus should be heard by more than one. A place for this purpose, secure and solitary, was to be chosen. To listen behind doors were to hazard a discovery; they might be seen, or overheard, or some trifling accident might give the alarm. The scene of action at length was fixed. They chose the cavity between the roof of the house and the ceiling of the room. In that vile lurking hole, with an execrable design, three Roman senators lay concealed, their ears applied to chinks and crannies, listening to conversation, and by fraud collecting evidence."—MURPHY. *Tacit. Annal.*, iv. 69.

the reward, either in hand or expected, must, to such a person, be not only a strong inducement to engage in the work, but also a temptation to give an ample measure of service to his employer, and so incline the hireling to see and hear more than realities, to indulge in fancy, and to enlarge, distort, and color whatever for his purposes may require this treatment.*

To a spy of this description are applicable these observations of Addison: "A man, who is capable of so infamous a calling as that of a spy, is not very much to be relied upon. He can have no great ties of honor, or checks of conscience, to restrain him in those covert evidences, where the person accused has no opportunity of vindicating himself. He will be more industrious to carry that which is grateful, than that which is true. There will be no occasion for him, if he does not hear and see things worth discovery; so that he naturally inflames every word and circumstance, aggravates what is faulty, perverts what is good, and misrepresents what is indifferent. Nor is it to be doubted, but that such ignominious wretches let their private passions into these clandestine informations, and often wreak their particular spite and malice against the person, whom they are set to watch." †

Evelyn, who was present at the trial of Lord Stafford, and heard the evidence of Titus Oates against him, has made in his diary the following observations on the worthlessness of the testimony of this witness, who was a spy on the Papists: "One thing

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* "I scarce would take your evidence on oath."—GIFFORD. *Juvenal*, v. 5.

† The Spectator, No. 439. [The recently discovered correspondence of Daniel Defoe, shows that it is possible for a brave and conscientious man —for such Defoe was—to play the part of a spy.—*See Life of Defoe, by W. Lee, London*, 1869.]

my Lord [Stafford] said as to Oates, which I confess did exceedingly affect me; that a person, who, during his depositions, should so vauntingly brag, that, tho' he went over to the Church of Rome, yet he was never a Papist, nor of their religion, all the time that he seemed to apostatize from the Protestant, but only as a spy; tho' he confessed he took their sacrament, worshiped images, went through all their oaths and discipline of their proselytes, swearing secresy and to be faithful, but with intent to come over again and betray them; that such an hypocrite, that had so deeply prevaricated, as even to turn idolator (for so we of the Church of England termed it), attesting God so solemnly that he was entirely theirs and devoted to their interest, and consequently (as he pretended) trusted; I say that the witness of such a profligate wretch should be admitted against the life of a peer, this, my Lord [Stafford] looked upon as a monstrous thing, and such as must needs redound to the dishonor of our religion and nation. And verily I am of his lordship's opinion; such a man's testimony should not be taken against the life of a dog." *

SECTION VIII.

OF THE BANKRUPTCY OF A WITNESS.

To hurt the credit of a witness, he is, in his cross-examination, often asked, whether he has not been a bankrupt, or asked some other question, from which it is hoped to draw from him a confession, that his pecuniary affairs are in a decayed or decaying state. Questions of this kind evidently imply, that an impoverished man is open to corruption and dishonesty;

* Evelyn's Diary (6 Dec. 1680), vol. i. p. 497, ed. 1818.

and a wish, besides, that in weighing the credit of the witness, the jury may conclude him to have been corrupted to forswear himself.

This is an old grievance to which poverty is exposed. At Rome, however honest a witness might be, however awful the oath administered to him, the contents of his purse determined the weight of his evidence.*

A suggestion that a witness will give dishonest evidence because he is in pecuniary difficulties, ought to be one of the most futile attempts to destroy his credit. Besides being very illiberal and even base, it is most illogical. There is no natural alliance between bankruptcy and impiety; between decayed fortune and perjury. Bankruptcy often, as all men know, springs from other traders' failures, or is the effect of fair, although it may be imprudent, competition or speculation in business. And it is every day seen, that a bankrupt in fortune is not a bankrupt in conscience.

SECTION IX.

OF A WITNESS'S WEAKNESS OF MIND.

It sometimes happens, that a person, although he has understanding enough to make him competent to be a witness, yet is of so weak a mind, that for this reason it is necessary to receive his evidence with caution.

Such a one may not be likely of his own accord, artfully, maliciously, or otherwise designedly, to forswear himself; yet it is plain he may have failed to perceive aright what he thinks he saw or heard; or his memory, not very tenacious, may lead him into error. He is

* Juvenal, Sat. iii. 137.

probably, too, more open to bias or prejudice, than persons of a strong mind are; and he is certainly a fit and likely object for designing people to tamper with, influence and mislead.

An instance of a witness, considered to be of a weak understanding, is found in the trial of Crossfield for high treason in 1796. The name of the witness was Winter, who gave his evidence for the Crown. And the chief reason to think him to be a man of a weak mind was a story he was in the habit of telling about a hare, which at 12 o'clock at night he threw over a gate among a kennel of hounds; and which, he believed, remained with the dogs some hours unhurt. It was surmised the hare might be a witch. At any rate, their amiable forbearance toward the hare is not without a precedent.*

This story of Winter came out in his cross-examination, and in the evidence of Collins, a witness for the defense. The latter described Winter, as a man who "dealt in the marvellous." Winter was an Englishman, of the age of 59, and the master of a vessel, and was owner both of the ship and cargo on the particular voyage mentioned in his evidence, from Newfoundland to Spain. He gave material evidence of words he heard spoken by Crossfield about a year previously. In summing up to the jury, Lord Chief Justice Eyre, made the following, among other, observations on Winter's evidence: "He was asked, whether he had not told a story of a hare, and he gave us some particulars of that story; and that certainly raises a considerable degree of doubt, whether this man is perfectly and entirely to be depended upon, in respect to his capacity; the story was certainly a foolish one, though not abso-

* Ovid, Fast. ii. 87.

lutely impossible to be true; but he added to it, that there was a notion that the place was troubled; which leads to a suspicion that he himself conceived there was something supernatural in the event which he related. This would be a strong mark of a distempered imagination. You will recollect that a witness [Collins] for the prisoner said, that Winter declared, that the hare was a witch, or a devil in the shape of a hare. That which dropped from this man himself, in the course of his evidence, concerning the place being troubled, connects very closely with what the witness related; and the whole, taken together, marks so strongly, that this man's mind is not perfectly composed, that it must weigh against the credit of his testimony, even though there should be no reason to doubt but that he means to speak the truth. This man has given very material evidence against the prisoner; but it can hardly be thought, having this cloud thrown over it, a sufficient foundation for a verdict in this important cause, between the king and the prisoner at the bar." *

A man at Winter's age, and in his class of life, must have had a very "distempered imagination," if, on the ground of incapacity, he was not to be believed in relating words he had heard a few months only before. It is not unlikely that many a sailor at the end of the last century "dealt in the marvellous." And it is probable the race is not yet extinct. "All sailors, it is notorious, are superstitious." "It is well known that the whole family of sailors is superstitious." †

* Crossfield's Trial (taken by Gurney), pp. 120, 212, 300.

† On this subject, see De Quincey's Autobiographic Sketches, pp. 333, 334, ed. 1853. [An instance of this came under our notice. A gentleman in New York desired to import some certain variety of the cat species, we forget what or whence; they were duly shipped, directed to him at

"How whistle rash bids tempests roar," *

has been, if it is not now, a common belief of sailors. "That this is a general superstition," says Sir Walter Scott in a note to that line, "is well known to all, who have been on shipboard, or who have conversed with seamen." "Many a good ship," says Southey, "has lost that tide, which might have led to fortune, because the captain and the crew thought it unlucky to begin their voyage on a Friday. You were in no danger of being left behind, by the packet's sailing on that day, however favorable the wind, if it were possible for the captain to devise any excuse for remaining till the morrow in harbor." †

SECTION X.

OF A WITNESS'S DEMEANOR UNDER EXAMINATION.

The carriage and behavior—in a word, the demeanor—of a witness, signified by his words, looks, or gestures while under examination, will deserve consideration in determining the credit which ought to be given to his testimony. Demeanor may be a warrant of integrity in the witness, or betray a want of it. It is often one can say of a witness, his manner is open and ingenuous—it is the manner of an honest witness. So a witness may be very honest, although his demeanor is, in some respects, open to censure, and

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New York. The vessel on which they were being transported, met with bad weather, the sailors insisted that it was occasioned by the presence of the cats, and it resulted in all the poor creatures being tossed overboard. We were employed to enforce compensation for the loss of the cats; payment was for a time resisted, on the ground that the destruction was necessary for the safety of the ship; eventually the parties compromised.—ED.]

* Rokeby, canto ii. st. 11. † The Doctor, vol. iii. p. 158, ed. 1835.

deserves rebuke. Constitution of mind, habit, manner of life, may give him a coarse, blunt tongue, and a manner, in appearance, yet not meant to be, uncivil or disrespectful. Such a rough, unrefined nature or carriage may well consist with a habit of speaking the truth, with an abhorrence of falsehood, and a wish and determination to give true evidence. A test and proof of his honesty may be that neither in taking the oath, nor giving his evidence, does his manner imply any irreverence for the oath, and its sacred duties.

Demeanor consisting in confusion, embarrassment, hesitation in replying to questions, and even vacillating or contradictory answers, are not necessarily a proof of dishonesty in a witness, because this deportment may arise from bashfulness or timidity, and may be the natural and inevitable effect of an examination by a skillful, practised, perhaps unscrupulous, advocate, whose aim in his questions is to entangle, entrap, and stupify the witness, and cause him to say and unsay any thing or every thing. It may not be good behavior in a witness to suffer his eyes to wander about the court while he is under examination, but this conduct may not be unnatural in the midst, perhaps, of an entirely new scene to him; and the distraction of mind occasioned by that employment of his eyes may well cause him, on returning to his duty, to answer hastily, and without consideration. But in all this there may be no intentional disrespect to the court; and the witness, notwithstanding, may be a very honest one. Again, it happens to all persons occasionally, without thought, to use one word for another, making the sense very different from what was intended; unconsciously we say that we did not mean to say. In like manner, a witness may inadvertently contradict himself. Demeanor, nevertheless, if it

affords any fair ground to suspect the witness does not speak the truth, imposes the necessity of caution in putting faith in his evidence.

What Lord Bacon says of boldness in civil business, that it hath somewhat of the ridiculous, and causes sport, is applicable to the demeanor of a bold witness: "Certainly, to men of great judgment, bold persons are sport to behold; nay, and to the vulgar, also, boldness hath somewhat of the ridiculous; for, if absurdity be the subject of laughter, doubt you not but great boldness is seldom without some absurdity; especially it is a sport to see when a bold fellow is out of countenance, for that puts his face into a most shrunken and wooden posture, as needs it must; for in bashfulness the spirits do a little go and come; but with bold men, upon like occasion, they stand at a stay—like a stale at chess, where it is no mate, but yet the game cannot stir." *

SECTION XI.

OF DIFFERENT EVIDENCE OF TWO WITNESSES.

A question of credit often arises on different, or contradictory, evidence given by two witnesses.

When two persons have been present when a fact took place, when something was heard or seen, and each gives an account of the fact, their stories sometimes quite, or at least very nearly, agree. But at other times it is found that the account which one gives of the fact, or if not of the fact itself, the main fact, yet of some accompanying circumstance, differs much from the account given by the other. A discrepancy of this kind necessarily raises a question of

* Bacon's Essays: Of Boldness.

credit; and this whether the witnesses are honest or dishonest.

Assuming that each of the two is an honest witness, the disagreement in their accounts is to be sought for in each one's perception of the thing seen or heard, the impression it made on him, and his remembrance of it. From inattention, interruption, a less acute sense of hearing or sight, distance from the sound or object heard or seen, or from some other cause, one may not have had the same perception or impression, which the other had, of the particular thing; or the memory of the one may be better than that of the other.

Very often the fact is the utterance of certain words; and the persons who differ may be two, of whom the speaker himself is not one; or two persons, of whom the speaker himself is one.

If the words are those spoken by one in the presence of two other persons, one of these two may not have caught all the words spoken; or, from the similarity in sound of words having different meanings, or from some other cause, he may have misapprehended them; and, supposing he heard the words, he may not remember all of them, or may retain but a faded impression of some of them. It very often happens, that two persons being present at a conversation between others, one may hear one part, and the other another; or one may recollect what he has heard, and the other may not.

Lord Clarendon's account of the trial of the Earl of Strafford contains this passage:—"That which was with most solemnity and expectation alleged against the Earl, as the hinge upon which the treason was principally to hang, was a discourse of the Earl's in the Committee of State (which they called the Cabinet Council). Sir Harry Vane, the Secretary of State, gave in evidence that the king at that time calling that committee to

him, asked them, since he failed of the assistance and supply expected by subsidies, what course he should now take? That the Earl of Strafford answered, 'Sir, you have now done your duty, and your subjects have failed in theirs; and therefore you are absolved from the rules of Government, and may supply yourself by extraordinary ways; you must prosecute the war vigorously; you have an army in Ireland, with which you may reduce this kingdom.' The Earl of Northumberland, being examined for the confirmation of this proof, remembered only that the Earl had said, 'You have done your duty, and are now absolved from the rules of Government,' but not a word of the army in Ireland, or reducing this kingdom. The Lord Marquis Hamilton, the Lord Bishop of London, and the Lord Cottington, being likewise examined, answered upon their oaths, that they heard none of those words spoken by the Earl. The Earl positively denied the words; alleged much animosity to be in Sir Harry Vane toward him; and observed, that not one of the other witnesses, who were likewise present, and as like to remember what was spoken as the Secretary, heard one word of the Irish army, or reducing this kingdom." *

In the case of Lord Strafford, his lordship denied that he had uttered the words imputed to him by Sir Harry Vane relating to the army in Ireland and reducing the kingdom; and it is probable he did not use them. This was a case, in which the person, accused of having used particular words, had a deep personal interest in the denial, his life depending in a great measure on his having uttered them or not; a circumstance, which, without imputing intentional falsehood in the speaker, would naturally incline him, if he had any

* Clarendon's History of the Rebellion, book iii. vol. i. p. 223, ed. 1707.

doubt about it, to insist that he had not used the expressions, so fraught with imminent danger to himself. But setting aside all personal interest in the matter, and supposing an instance, in which it may be perfectly indifferent to a person, whether he uttered certain words or not, there seems to be no reason why, generally speaking, a denial by a person that he used certain words should carry with it greater weight, and be more credited, than the affirmation by another person that he heard the words used. If the supposed speaker has previously meditated on the subject, on which he is about to speak, and has collected his ideas upon it, and has made up his mind, that, when he comes to speak, he will utter such ideas only, and will clothe them in such and such words, or so far as may be, others merely equivalent to them; here, the ideas and words will be impressed on his mind both before, and at the time of, their utterance; and if it be alleged he expressed other ideas, or used words not fitted to express the ideas intended, he may, and most probably will, be quite satisfied in his own mind, that he did not make use of the words attributed to him; and there will be a probability, that any one who avers the contrary will be in error, either from imperfectly catching the words, or from some other source of mistake. But if, in the case supposed, the speaker does not adhere to the plan, he had laid out for himself in giving expression to his ideas, and wanders into unmeditated arguments or topics, either from his conception of fresh ideas, just caught up from other persons' arguments or opinions, or into which new ideas he has in the course of his speech been led, either impelled by fancy, or, through the heat of debate, by passion; in such a case the speaker may very possibly utter words, making at the time but small impression on his mind, and easily forgotten by him. And in

such a case, if he be charged with expressing those fresh ideas, it may not be in his power, with perfect satisfaction to himself, to say, he did not imbibe or entertain such new ideas, or did not express them in the language imputed to him. And if another person says he heard them, the preponderance of probability may be, that he speaks the truth.

On the trial of Lord George Gordon, a witness (Lord Stormont) after giving in evidence what he had said to Lord George Gordon, and what Lord George Gordon had said to him, being asked whether he was accurate as to the words, replied—"I am, I think, most particularly accurate to every word that I used, and very accurate as to the strict and exact sense of the words used by Lord George Gordon; I cannot speak with the same accuracy, as to the words used by another, as I can to the words used by myself." *

It constantly happens, that, through anger, haste, or other cause, one word is spoken for another; the idea intended to be uttered being expressed by a word, unsuited to it, and conveying a different meaning.

> "*Brutus.* You say, you are a *better* soldier.
> *Cas.* You wrong me every way, you wrong me Brutus;
> I said, an *elder* soldier, not a *better*." †

And even where a person has a word impressed on his mind by his hearing some one else make use of it, and he means to adopt and utter the same word, yet in the hurry of speech he may use another of a different meaning, the difference under particular circumstances being very important. This happened on a very memorable occasion, when a person intending to say of a prisoner he was not *discharged*, said he was not *ac-*

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* Trial of Lord G. Gordon (taken by Gurney), Part ii. p. 19.

† Julius Cæsar, A. iv. S. 3.

quitted. On the trial of O'Coigly, O'Connor, and others, for high treason, in 1798, O'Coigly was found guilty, but O'Connor and the others were *acquitted;* but before they were *discharged*, a Bow-street officer appeared in court with a warrant to apprehend O'Connor, on another charge, and thereupon one of the judges present, Mr. Justice Buller, called out, "They are not *discharged*; put the others back, and let O'Coigly stand forward." His lordship then passed the sentence of death on O'Coigly; and immediately after a riot took place in the court, occasioned by O'Connor's jumping over the bar, behind which he stood, and attempting to escape. In the midst of this riot it was, that the word *acquitted* was used instead of *discharged.*

Lord Romney, who used it, gives the following account of his mistake. His lordship, being a witness on the trial of the Earl of Thanet and others for the riot mentioned, in his evidence of what he said during the riot, after O'Connor was brought back by several javelin-men, expresses himself thus:—"I then immediately said to the javelin-men, 'Form yourselves round the prisoner, and let no one approach you, for he is not yet,' I meant to say, and imagine I did say, *discharged.* I was told afterward that I had said wrong—for I had said he was not *acquitted;* upon which I answered, I might very possibly make use of the word *acquitted;* but, if I did, it was a mistake; I meant *discharged.* I think it was Mr. Fergusson who told me I had said wrong. He said, 'My lord, you are mistaken; you said he is not *acquitted*,—he is *acquitted.*' I have no doubt myself, as Mr. Fergusson mentioned it, but that I did make use of the word *acquitted*, in the hurry: it was not my intention to say he was not *acquitted*, but that he was not *discharged;* I meant to make use of the word that I heard Mr. Justice Buller make use of from the Bench.

I meant to make use of the word *discharged*, because I had heard Mr. Justice Buller use the word *discharged*." *

The difficulty a person has in remembering words spoken by himself or by another, even a very short time previously, is acknowledged in one of the Orders of the House of Commons, as they existed in the reign of Charles I., it being then, "against the Orders and practice of the House, that any man should be called upon to explain, for any thing he said in the House two days before; when it could not be presumed, that his own memory could recollect all the words he had used; or, that any body else could charge him with them." †

It is very clear that two persons may be present when a thing is said to be done by a third, and one of the two may hear or see it, and the other not. And therefore if A. says that a certain conversation took place between B. and C. in a room where D. was present; and D. says that no such conversation took place; A. and D. are in conflict, and necessarily so, if it was impossible for the conversation to take place without D.'s hearing it. But if D. says he did not hear the conversation, or, meaning the same thing, that it did not take place, A. and D. are not necessarily in conflict, if it was possible the conversation might have passed without D.'s hearing it." ‡

With regard to words uttered, these mistakes may arise:—When several persons have spoken, one of the hearers may say, that the words in question were those of A., while another will affirm they were used by B.

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* See the Evidence of Lord Romney on the Trial of the Earl of Thanet and others, contained in vol. iii. of Erskine's Speeches, pp. 342, 343, 3d ed.

† Clarendon's Hist. of the Rebellion, book iv. vol. i. p. 315, ed. 1707.

‡ See Way *v.* East, 2 Drewry, 72.

And it is very possible for a hearer, through forgetfulness, to transfer the words used from him, who did utter them, to him who did not.

When two persons have heard a third tell them something, the two not unfrequently differ in what was said. "I forgive thy wit, replied the Abbot, on condition thou wilt show me the way to Cedric's mansion. Well, then, answered Wamba, your reverence must hold on this path till you come to a sunken cross, of which scarce a cubit's length remains above ground; then take the path to the left, there are four which meet at Sunken Cross, and I trust your reverences will obtain shelter before the storm comes on. . . .

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Here is the clown's sunken cross, and the night is so dark that we can hardly see which of the roads we are to follow. He bid us turn, I think, to the left. To the right, said Brian, to the best of my remembrance. To the left, certainly, the left; I remember his pointing with his wooden sword. Ay, but he held his sword in his left hand, and so pointed across his body with it, said the Templar. Each maintained his opinion with sufficient obstinacy, as is usual in all such cases." *

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* Ivanhoe. [In Starkie on Evidence (vol. iii. p. 462 *n*), mention is made of a case, in which the judge, in summing up, stated that the witness had said, "I *am* the drawer." The witness in fact, stated, "I *know* the drawer." The error was corrected. Mr. Starkie remarks, "Had the witness made the same mistake, the consequences might have been fatal." To this the Editor of Cowen and Hill, and Edwards' notes to Phillips on Evidence, vol. i. p. 715, ed. of 1868, adds: One Caldwell was on trial for perjury, in having denied the existence of a slightly material circumstance against one Baker, who was on his trial for murder, stood already contradicted by several witnesses who swore to the circumstance, and to Caldwell's knowledge of it. The circumstance having happened some fourteen or fifteen years before, gave room to suppose he might have forgotten it. Had the jury believed this, his acquittal was certain; but Caldwell had recently been

On the trial of Frost, for high treason in 1840, two boys, Rees and Coles, were witnesses for the Crown. On the occasion they referred to, they were both at the same time standing near to Frost. Rees said, he heard Frost and a man called Jack the Fifer, say to the mob, "March!" Coles said, "I heard Jack the Fifer say, 'March!' I did not hear Frost say any thing." Upon this difference in the evidence, the Chief Justice Tindal observed, "Here is incongruity, rather than contradiction between their evidence; because one might hear the two say it, and the other hear only one. It is not a very material matter, when two persons are giving an account of the same discourse or transaction, that there should be some variation, and a want of exact similitude between the accounts they both give." *

On the trial of Hardy for high treason in 1794, Groves and Green, both witnesses for the Crown, directly contradicted each other; their different accounts relating to words, which Groves positively said he heard Green use, and which Green as positively said he did not use. From the materials contained in the trial, it might be very difficult to collect which of the two witnesses spoke the truth; but their conflicting evidence is now of value, for the sake of the judge's observations on credit in a case of contradictory evidence. Lord Chief Justice Eyre, in summing up to the jury, told them: "Here, undoubtedly, there is a flat contradiction

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examined on a charge of participation in the murder; this examination was before three justices, named, Newton, Sweet, and Thompson; Newton testified that, on such recent examination, Caldwell had *admitted* his recollection of the circumstance in question. The prisoner's conviction then seemed certain; but before the trial terminated, the other two justices, Sweet and Thompson, gratuitously came to the stand, and testified that on the examination referred to, Caldwell had *denied* his recollection of the circumstance in question. Caldwell was acquitted; but for the interposition of Messrs. Sweet and Thompson, he would probably have been convicted.]

* Frost's Trial (taken by Gurney), pp. 698, 699.

between Green and Groves; they are both witnesses called on the part of the Crown; they certainly put you under a dilemma, and make it difficult for you to be satisfied that Groves is a person, who is entitled to credit for what he has said. At the same time, though Groves is contradicted in this particular by this witness, he is contradicted in no other particular, where witnesses might have been called to contradict him. That is a circumstance for your consideration, upon which you will exercise your judgment. I am not at all pressing you to incline to give more credit to a witness, who has been contradicted in one particular, than the whole tenor of his evidence, upon the whole, entitles him to." *

On the above-mentioned trial of Frost, two witnesses were, on a very important fact of time, at an irreconcilable variance in their accounts of it. One of these witnesses, Hodge, said, that on the 4th November, between 7 and 8 in the morning he was at P., a distance of twelve miles from his own house at B.; that from thence he went home on foot; and that he was not at home till after 9 o'clock that morning. The other of the two witnesses, Jones, said, that between 8 and 9 she saw the other witness, Hodge, in bed at his own house. To meet the contradictory evidence of Jones, a third witness, Watts, was called, who said, that on the same morning he met Hodge at W. O., from half-past 8 to 20 minutes before 9, three miles and a half from P., and about eight miles from B.

Hodge was a witness for the Crown, and his evidence was very important, and especially as regarded a conversation which he said took place between Frost and himself and other persons at P. On the credit to

* Hardy's Trial (taken by Gurney), vol. ii. p. 392; vol. iii. pp. 5, 6 118, 119; vol. iv. p. 390.

be given to Hodge, Lord Chief Justice Tindal told the jury: "P. is the spot at which the alleged conversation took place; and if he was not there at the time he states he heard the conversation, that would at once make him a witness in whom you could place no confidence whatever. Therefore the inquiry, to which you are in the first instance to bring your minds as to this witness, is, to determine upon the value of the witness's testimony, before you give it any credit at all." And in noticing Jones' evidence he said, "You cannot set down one witness by contradicting his evidence by another, unless you are first satisfied that the second witness is superior in value to the first." And on Watts' evidence his lordship remarked: "If this man is correct in the judgment he is giving of the time and the distance at which he met Hodge, then the evidence of Jones cannot be true." And on the evidence of both Jones and Watts he told the jury: "It is for you to decide which of them is speaking the truth; you must make up your minds, from the manner in which they gave their evidence, the demeanor of the witnesses, and still more from the probability of the account and circumstances which they relate before you." *

It may happen that when one person does one thing, and another another, each may think and say he did that, which the other did. Here each is mistaken, but his mistake need not at all affect his credit. On the same trial of Frost, part of the evidence for the Crown was, that a large and armed mob had assembled in front of an inn, in which soldiers were placed, the soldiers being in a room looking toward the front, and having in it one projecting window, namely, a bow with three windows, one of which, that nearest to the passage or

* Frost's Trial (taken by Gurney), pp. 297, 527, 534, 722, 723.

entrance to the inn, being, to a person in the room, and looking toward the projecting window, on the left of the middle of the three windows. The lower half of the shutters of each of the three windows was closed; and it becoming necessary, for the purpose of firing on the mob, to open the shutters, they were opened by Phillips and Gray, witnesses on the trial. On the fact that the shutters were opened, Phillips and Gray agreed in their evidence; but they differed in their evidence of the person who opened the shutters of the left-hand window and those of the middle window. Phillips said that he opened the shutters of the window on the left, and that Gray opened the shutters of the middle window. On the contrary, Gray said that he opened the shutters of the window on the left, and that Phillips opened the shutters of the middle window. Lord Chief Justice Tindal told the jury the point was perfectly immaterial, unless the variance and discrepancy between the witnesses was of such a nature as to impair their confidence in the one or the other.*

Also, when a thing is done by one person, and the like may be done by another; and each of two persons thinks and says he did a something, which may correspond either with the thing first mentioned, or with that like it, it will not follow that the two persons mean the same thing; and there may consequently be no contradiction between them, and their credit may be in no wise affected by what they say. On the same trial of Frost, the two witnesses, Phillips and Gray, agreed so far that the soldiers were ordered to load; and Phillips said he ordered them, and Gray said he did. "It is possible," said the Lord Chief Justice Tindal, "that both might have done it, and that Gray did not hear

* Frost's Trial (taken by Gurney), pp. 238, 248, 249, 707.

the order given by Phillips. It is very immaterial to the main question, because such discrepancies as this may exist very well between witnesses, without at all breaking in upon the weight due to the testimony of each." *

An instance of contradictory statements is furnished by Hume, in a matter relating to an action between the English and Dutch fleets; and the historian suggests a presumption on which side the truth lies. "Tromp, an admiral of great renown, received from the States the command of a fleet of forty-two sail, in order to protect the Dutch navigation against the privateers of the English. He was forced by stress of weather, as he alleged, to take shelter in the road of Dover, where he met with Blake, who commanded an English fleet much inferior in number. Who was the aggressor in the action, which ensued between these two admirals, both of them men of such prompt and fiery dispositions, it is not easy to determine; since each of them sent to his own State a relation totally opposite in all its circumstances to that of the other, and yet supported by the testimony of every captain in his fleet. Blake pretended, that, having given a signal to the Dutch admiral to strike, Tromp, instead of complying, fired a broadside at him. Tromp asserted, that he was preparing to strike, and that the English admiral, nevertheless, began hostilities. It is certain that the Admiralty of Holland, who are distinct from the Council of State, had given Tromp no orders to strike, but had left him to his own discretion with regard to that vain but much contested ceremonial. They seemed willing to introduce the claim of an equality with the new Commonwealth, and to interpret the

* Frost's Trial (taken by Gurney), p. 237, 248, 251, 707.

former respect, which they had ever paid the English flag, as a deference due only to the Monarchy. This circumstance forms a strong presumption against the narrative of the Dutch admiral. The whole Orange party, it must be remarked, to which Tromp was suspected to adhere, were desirous of a war with England."*

Time and place are concomitant circumstances of every fact; and probably most facts have other attending circumstances, which attract, or might attract, attention. Supposing two persons heard the same words, or saw the same deed, and each to have in his memory an equal impression of the fact, the words or the deed, then each will be able to give the same account of the fact, and he does so if he narrates faithfully from his memory. But of the time, place, or other attending circumstances, the account of the one may differ from that of the other. A cause of the difference may be, that one of the two noticed more of these circumstances than the other did; or that one of them has forgotten some of the circumstances. Prescott, in his History of the Reign of Ferdinand and Isabella, thus speaks of the Tourney at Trani in Italy, in 1502:—"This celebrated Tourney, its causes, and all the details of the action, are told in as many different ways as there are narrators; and this, notwithstanding it was fought in the presence of a crowd of witnesses, who had nothing to do but look on, and note what passed before their eyes. The only facts in which they all agree are, that there was such a tournament, and that neither party gained the advantage."† Supposing, then, several persons relate a story, in the main fact of which they agree, but on some

* Hume's History, ch. lx. vol. vii. p. 220, ed. 1763.

† Vol. iii. p. 103, note, ed. London, 1838.

attending circumstance they differ, this difference need not invalidate the testimony, which each gives of the main fact. This, in "Othello," is the result of a communication of different news by the Duke and certain senators. *

"I know not," says Paley, "a more rash or unphilosophical conduct of the understanding, than to reject the substance of a story, by reason of some diversity in the circumstances, with which it is related. The usual character of human testimony is, substantial truth under circumstantial variety. This is what the daily experience of courts of justice teaches. When accounts of a transaction come from the mouths of different witnesses, it is seldom that it is not possible to pick out apparent or real inconsistencies between them. These inconsistencies are studiously displayed by an adverse pleader, but oftentimes with little impression upon the minds of the judges. On the contrary, a close and minute agreement induces the suspicion of confederacy and fraud. When written histories touch upon the same scenes of action, the comparison almost always affords ground for a like reflection. Numerous, and sometimes important, variations present themselves; not seldom also, absolute and final contradictions; yet neither one nor the other are deemed sufficient to shake the credibility of the main fact. The embassy of the Jews to deprecate the execution of Claudian's order to place his statue in their temple, Philo places in harvest, Josephus in seed-time; both contemporary writers. No reader is led by this inconsistency to doubt, whether such an embassy was sent, or whether such an order was given. Our own history supplies examples of the same kind. In the

* Othello, A. i. S. 3.

account of the Marquis of Argyle's death, in the reign of Charles the Second, we have a very remarkable contradiction. Lord Clarendon relates that he was condemned to be hanged, which was performed the same day; on the contrary, Burnet, Woodrow, Heath, Echard, concur in stating that he was beheaded; and that he was condemned upon the Saturday, and executed upon the Monday. Was any reader of English history ever sceptic enough to raise from hence a question, whether the Marquis of Argyle was executed or not?" *

SECTION XII.

OF ONE WITNESS'S OPINION OF ANOTHER.

It is a common question put to a witness, whether he would believe a certain other witness on his oath; as in the form,—"Is he a man you would believe on his oath?" The witness so questioned may answer positively and unconditionally,—"No, I would not;" or with such a qualification as this,—"Certainly not, if he was contradicted by respectable testimony." It is difficult to discover any sound principle on which this question can be asked; and not to see the injustice it may do the witness, whose veracity is suspected. The an-

* Paley's Evidences of Christianity, part iii. ch. i. [Not long before the death of Mr. Justice Le Blanc, and whilst he was presiding as one of the judges of assize, at Lancaster, he had a fainting fit. Some time afterward, the circumstance being the topic of conversation among a considerable number of the members of the bar who had been present, a doubt was started, whether the fact had taken place in the ordinary Civil Court or in the Crown Court, in which civil causes were usually tried after the termination of the business on the Crown side; and those who had been actual spectators were divided as to their recollection in which of the two courts the circumstance had occurred, many asserting that it took place in the one court, and nearly as many that it occurred in the other court.]

swer, whether favorable or adverse to the character of the witness, is mere opinion; and supposing it to be an honest one, one well grounded in the estimation of the person who gives it, yet the answer does not disclose the ground of it; and supposing that, through a cross-examination, the ground of it does appear, then surely, to be just toward the witness excepted against, the jury ought to inquire into the reasonableness and sufficiency of the ground. Hearsay may be the chief, if not the only, foundation of the opinion. And supposing the witness objected to, has a character for lying on ordinary occasions, and on unimportant matters, it must be seen there is a great difference between telling stories of this kind, and telling a falsehood upon oath.* Many persons have a very thoughtless way of talking in common conversation, inventing and exaggerating things, from mere inconsiderateness and gaiety of disposition, and will say what they will not swear. Does the witness, deposing against the other, know an instance in which the latter has sworn falsely? There is so great a difference between a lie upon oath, and one without it, that unless a man has before perjured himself, it is not only a rash and harsh, but an illogical, conclusion, that because he has told a lie, or many lies, without oath, he is not to be believed when, in a cause between man and man, he swears to speak the truth. And again, to be just toward the witness, whose character for veracity is disputed, a search into the motive, which may prompt the testimony against him, seems to be indispensable; some old quarrel, or spite, may lurk at the bottom of it. The witness's opinion may be formed of very loose materials, hastily put together, and not at all

* [Life of Johnson, by Boswell, vol. v. p. 141, ed. 1835, cited in the following chapter.]

justifying it; and it plainly, in its nature and kind as opinion, bears no resemblance to some other opinions, which are fairly and rightly admitted as evidence; such as those of learned or scientific men, founded on their long study and experience in particular branches of learning, science, or art.

CHAPTER XI.

OF A WITNESS UNDER EXAMINATION.

The duty of every witness, sworn to speak "the truth, the whole truth, and nothing but the truth," is to observe strictly the oath he has taken. In the performance of this duty, the witness (an honest one is meant, that is, one desiring to keep his oath) often meets with many difficulties; some emanating from himself, and others from the manner of his examination.

Whether rightly or not, the witness may think his task full of embarrassment and difficulty, because his examination is in public, before a tribunal presenting a grave and solemn appearance; before a large assembly of people, hearers and spectators, a scene perhaps wholly new to him. To him it may be a trouble publicly to tell his story at all; but to make the matter worse, this story he is generally not allowed to tell in his own way, in the manner he would tell it privately among his friends. He usually finds he has to relate it only in his answers to questions put to him. This restriction laid on him at the outset, to relate his story by answers only, his discovery that he is not permitted to tell it in the manner he naturally otherwise would, wholly spoils the arrangement he has made in his own mind of the matters he has to tell, occasions a confusion of them, and thence causes him embarrassment. He is unaccustomed to this mode of telling a story; and it can therefore be readily understood, that often his answers will stray from the strict limits of the questions put to him.

To relate facts correctly requires in all cases some

thought, and the time necessary for it. And if the facts are not at once remembered in the order in which they happened, time may be required to sort and range them in their proper order. And suppose, in the case of a witness, they are already so ranged in his mind, it may be difficult for him, instantly on being questioned, to produce the particular fact, which the question calls for. At any rate the ability to do this requires composure of mind, and a power of abstraction from irrelevant thoughts; and any thing disturbing that composure or power is a hindrance to the witness.

Hence where the question is perfectly well understood by him, and he has no objection to answer it in a plain direct manner, yet he often goes about to answer it. He naturally does what he would do on being asked a question in conversation, or otherwise upon ordinary occasions. His mind retreats within itself to find the answer. This must relate to something that has happened, and a consequence is, he searches his memory, and in doing so falls in, perhaps, with something, which leads him astray from the point of the question; he is involved in a train of ideas, connected indeed with the question, and leading to the answer, but he has to make his way through those ideas to get at it.

In every-day life, in common conversation, questions are often answered in a very indefinite, loose, manner.

A person asked where he has been, will reply by saying what he was doing; leaving the place to be gathered, as it often may, from the employment:—

> "Where hast thou been, sister?
> Killing swine;" *

or asked who he is, will reply where he comes from:—

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* Macbeth.

"Who knocks so loud, and knocks so late?
From Branksome I;" *

or asked if he saw a person, will indirectly tell you he did:—

"Saw you my master?
But now he parted hence, to embark for Milan;" †

or asked where a person is, will indirectly tell you by another question:—

"Where is the master, boatswain?
Do you not hear him?" ‡

On being asked, what was said, he will first tell you what he saw:—

"'And what did he say, on hearing I was at Bath?'
'Sir, in my life, I never saw an elderly gentleman more astonished.'" §

At first his answer is undecisive, but, on pressure, it is positive:—

"*Gloster.* You know the character to be your brother's?
Edmund. If the matter were good, my lord, I durst swear it were his; but in respect of that, I would fain think it were not.
Gloster. It is his.
Edm. It is his hand, my lord." ‖

At first, he does not know, and then, on reflection, he does know:

"Well, I do not know;
He died before my day of Sextonship."
* * * * * * * * *
"I believe the man of whom
You wot, who lies in this selected tomb,
Was a most famous writer in his day." ¶

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* Lay of the Last Minstrel.
† Two Gentlemen of Verona.
‡ The Tempest.
§ The Rivals.
‖ King Lear.
¶ Byron's Churchill's Grave.

Sometimes the inquirer is kept in suspense by the mode of answering:—

"'How old art thou?'

'Not so young, sir, to love a woman for singing; nor so old, to dote on her for any thing: I have years on my back forty-eight.'"*

"*King Richard.* Stanley, what news with you?
Stanley. None good, my liege, to please you with the hearing;
Nor none so bad, but well may be reported.
K. Rich. Heyday, a riddle! neither good nor bad!
What need'st thou run so many miles about,
When thou may'st tell thy tale the nearest way?
Once more, what news?
Stan. Richmond is on the seas."†

"*King Henry.* Now by thy looks
I guess thy message. Is the queen deliver'd?
Say, ay; and of a boy.
Lady. Ay, ay, my liege;
And of a lovely boy: The God of heaven
Both now and ever bless her!—'tis a girl,
Promises boys hereafter." ‡

"How oddly thou reply'st!" Juliet might well say to her nurse, who kept tantalizing her with rambling talk, instead of answering her impassioned inquiries,—

"O honey nurse, what news?
Hast thou met with him?
* * * * * * *
Is thy news good, or bad? answer to that;
Say either, and I'll stay the circumstance:
Let me be satisfied, Is't good or bad?
* * * * * * *
But all this did I know before:
What says she of our marriage? What of that?
* * * * * *
Sweet, sweet, sweet nurse, tell me, what says my love?" §

Sometimes an answer is one, that is called a reasoning answer:

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* King Lear.
† Richard III.
‡ Henry VIII.
§ Romeo and Juliet.

"How tall was she?
About my stature: for, at Pentecost,
When all our pageants of delight were play'd,
Our youth got me to play the woman's part,
And I was trimmed in Madam Julia's gown,
Which served me as fit, by all men's judgment,
As if the garment had been made for me;
Therefore, I know she is about my height." *

And a reason asked for, the answer is often a "woman's reason:"

"Of many good, I think him best.
Your reason?
I have no other, but a woman's reason;
I think him so, because I think him so." †

The way in which an Irish peasant answers questions is thus told by Sir Jonah Barrington:—"The Irish peasant never answers any question directly. In some districts, if you ask him where such a gentleman's house is, he will point and reply, 'Does your honor see that large house there, all amongst the trees, with a green field before it?' You answer, 'Yes.' 'Well,' says he, 'plaze your honor, *that's not* it. But do you see the big brick house with the cow-houses by the side of that same, and a pond of water?' 'Yes.' 'Well, plaze your honor, *that's not* it. But, if you plaze, look quite to the right of that same house, and you'll see the top of a castle amongst the trees there, and with a road going down to it betune the bushes.' 'Yes.' 'Well, plaze your honor, *thats not* it neither—but if your honor will come down this bit of a road a couple of miles, I'll show it you, *sure enough*.'"‡

If in every-day life answers of an indefinite, loose description of the kinds above noticed, are not unfrequently given, it need be no wonder, and may indeed be

* Two Gentlemen of Verona. † Ibid.

‡ Sir Jonah Barrington's Personal Sketches, vol. i. p. 154, ed. 1827.

expected, that answers equally inappropriate or singular will sometimes come from a witness. And this expectation should incline the interrogator to meet all such answers with forbearance and courtesy.

The following very droll interjections—for answers they can hardly be called—were given by a witness, a cutler at Sheffield, on the trial of Hardy. They occur in Mr. Gibbs' cross-examination of him:

"Q. Had any of the people in this Society [Constitutional Society at Sheffield], to which you belonged, any idea of making any attack upon either the King, or the House of Lords; had they any idea of altering the government in this respect?

A. I think they ought to have been sent to Bedlam if they had.

Q. Had you, as one of that Society, any such intention yourself?

A. Just the same as flying to the sun.

Q. But to speak plain; by that you mean, I suppose, that you never had any such thought in your mind?

A. No, never." *

One very common way in which a witness supplies an answer is, to suppose or assume something, and to reason and conclude upon it, and the result is, what is called a "reasoning answer." This kind of reply is always objectionable, on the plain ground that the supposition or assumption may not authorize the conclusion drawn from it. A witness, instead of saying that a particular thing was so, will say, it must have been so. On these occasions, the witness is properly admonished in this manner,—Do not tell us what must be, tell us

* Hardy's Trial (taken by Gurney), vol. ii. p. 210.

what was.* A witness (a woman) is asked,—"Have you never declared to any body, that you had an expectation of some provision from the cause now in hand?" The witness answers, "I could not declare it, as I had no offer made me from the prosecutor."† Here the witness reasons on there being no offer made, and from the want of it would have the inference drawn, she did not make the declaration; although it is manifest she might have done this, notwithstanding the offer was not made.

It is obviously advantageous to the side examining its own witness, that the witness be in a composed state of mind, and free from any cause to ruffle his temper. The advocate therefore examining him will probably think it to be his first care, to remove any timidity in the witness, to soothe all nervous excitement in him, to set him as far as possible at his ease. This may often be effected by, as an introduction to his evidence, asking him questions of his name, age, place of abode, and the like simple inquiries easily answered. Self-possession being infused into him at the outset, it will then be a chief object to sustain it, by throughout the examination addressing the witness in a gentle, conciliatory tone and manner. It will plainly much assist to preserve the witness's composure and self-possession, to interrogate him in words unambiguous and easily understood; and if the witness be of humble life, to make use of common and homely words likely to be most familiar to him; and, as occasion is found, to borrow and take advantage of provincial words and phrases, used in the place or district where the witness lives. And on this head it may be useful to bear in mind, that persons in a low station of life understand and use many words in

* Frost's Trial (taken by Gurney), p. 466.

† Trial of Duchess of Kingston, folio, p. 112.

a sense different from the common meaning of them among educated persons. The witness may not understand the expressions of the advocate, and, on the other hand, the advocate may not understand those of the witness. A provincial pronunciation of words is also a source of mistakes.

On Boswell telling Dr. Johnson of an earthquake, which had been felt in Staffordshire, Dr. Johnson said to him,—"Sir, it will be much exaggerated in public talk; for, in the first place, the common people do not accurately adapt their thoughts to the objects; nor, secondly, do they accurately adapt their words to their thoughts: they do not mean to lie; but taking no pains to be exact, they give you very false accounts. A great part of their language is proverbial. If any thing rocks at all, they say *it rocks like a cradle;* and in this way they go on." *

"Clearness," said Wesley to one of his lay-assistants, "is necessary for you and me, because we are to instruct people of the lowest understanding; therefore we, above all, if we *think* with the wise, must yet *speak* with the vulgar. We should constantly use the most common, little, easy words (so they are pure and proper), which our language affords. When first I talked at Oxford to plain people in the castle or the town, I observed they gaped and stared. This quickly obliged me to alter my style, and adopt the language of those I spoke to."†

"A poor Welsh woman leaving home to attend an annual meeting of the Methodists, replied to me, who had questioned her as to the numerical amount of the probable assemblage, that 'perhaps there would be a

* Life of Johnson, by Boswell, vol. vi. p. 272, ed. 1835.

† Life of Wesley, by Southey, vol. ii. p. 79, ed. 1820.

matter of four millions.' This in little Caernarvon, that by no possibility could accommodate as many thousands." *

"The blade-bone of a shoulder of mutton is called in Scotland 'a poor man,' as in some parts of England it is termed a 'poor Knight of Windsor;' in contrast, it must be presumed, to the baronial Sir Loin. It is said that in the last age an old Scottish peer, whose conditions (none of the most gentle) were marked by a strange and fierce-looking exaggeration of the Highland countenance, chanced to be indisposed while he was in London attending Parliament. The master of the hotel where he lodged, anxious to show attention to his noble guest, waited on him to enumerate the contents of his well-stocked larder, so as to endeavor to hit on something which might suit his appetite. 'I think, landlord, said his lordship, rising up from his couch, and throwing back the tartan plaid, with which he had screened his grim and ferocious visage,—I think I could eat a morsel of a *poor man*.' The landlord fled in terror, having no doubt that his guest was a cannibal, who might be in the habit of eating a slice of a tenant, as light food, when he was under regimen." †

"The magistrates were closely interrogated before the House of Peers, concerning the particulars of the mob; and the *patois*, in which these functionaries made their answers, sounded strange in the ears of Southern nobles. The Duke of Newcastle having demanded to know, with what kind of shot the guard, which Porteous commanded, had loaded their muskets, was answered naively, 'Ow, just sic as ane shoots *dukes* and *fools* with.' This reply was considered as a contempt of the House of Lords,

* De Quincy's Works (Paper on Cicero), p. 179, ed. 1858.

† Bride of Lammermoor, note to ch. xi.

and the Provost would have suffered accordingly, but that the Duke of Argyle explained, that the expression, properly rendered into English, meant *ducks* and *water-fowls.*"*

Pepys mentions that he was present at Guildhall to hear a trial before Lord Chief Justice Hide, relating to a ship deserted by the master and crew on the coast of France, for the purpose of cheating the insurers. "There was," he says, "all the great counsel in the kingdom in the cause; but after one witness or two for the plaintiff, it was cried down as a most notorious cheat; and so the jury, without going out, found it for the plaintiff." "But," he adds, "it was pleasant to see what mad sort of testimonies the seamen did give, and could not be got to speak in order; and then their terms, such as the judge could not understand; and to hear how sillily the counsel and judge would speak, as to the terms necessary in the matter, would make one laugh."†

Very often a defect in an answer should not be laid on the witness, but on the interrogator. If an advocate makes use of an expression or word which the witness does not understand, he sometimes gives an answer, fancying he knows, but in reality without understanding the meaning of the question: the reply may be a mere echo of it. As in this instance, where the witness was a "small farmer":

"Q. Did you hear N. predict any thing?

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* Note in Heart of Mid-Lothian. [Lord Eldon, when examined for a scholarship, in answer to the questions usual on such occasions, stated his father was a "fitter" (factor), and he so pronounced the word as to be mistaken for fiddler. On the close of the examination, the President of the Board of Examiners said, There is no doubt young Scott is by far the best scholar, but has told us his father is a fiddler, and I do not quite like to take the son of a fiddler into the College.—1 *Life of Lord Eldon*, 32 *Am. ed.*]

† Pepys' Diary, vol. ii. p. 69, 6th ed.

A. I did not hear him predict any thing.

Q. Do you know what a prediction is?

A. No; I have been at work ever since I was seven years old."

"Having talked of the strictness with which witnesses are examined in courts of justice, Dr. Johnson told us, that Garrick, though accustomed to face multitudes, when produced as a witness in Westminster Hall, was so disconcerted by a new mode of public appearance that he could not understand what was asked. It was a cause where an actor claimed a free benefit, that is to say, a benefit without paying the expense of the house; but the meaning of the term was disputed. Garrick was asked, 'Sir, have you a free benefit?' 'Yes.' 'Upon what terms have you it?' 'Upon—the terms—of—a free benefit.' He was dismissed as one from whom no information could be obtained."*

Here it is possible that Garrick was disconcerted, but his answer was strictly correct, although the court gained no information from it. He had the free benefit upon the terms of a free benefit. According to the above report, he was not asked what those terms were. If the question had been put to him: what are the terms of a free benefit? it is scarcely possible to imagine Garrick so disconcerted as not instantly replying,—exemption from paying the expense of the house.

Docility and friendliness of a witness are of the utmost consequence. And courtesy towards him is a probable means to obtain and keep them; courtesy

* Life of Johnson, by Boswell, vol. iv. p. 266, ed. 1835. [This effect upon a person, of getting him into a situation to which he is unaccustomed, is noticed by Anthony Trollope in one of his novels: Lily Dale (locq.) "I always like to get him (Hopkins, the gardener) into the house, because he feels himself a little abashed by the chairs and tables; or, perhaps, it is the carpet that is too much for him. Out on the gravel walks he is such a terrible tyrant, and in the green-house he almost tramples on one."]

in words, voice and manner. Rudeness or incivility toward him is very likely to put him out of temper, to make him lay back his ears.*

Little peculiarities of his nature must be humored; his sense of personal dignity must not be offended; if he be deaf, or have an impediment in his speech, this infirmity must not be a subject of merriment; and if his voice be naturally or from timidity low, he should be gently, not roughly, exhorted to speak up. So, if the witness exhibit any clownish or awkward habit or manner, it may be better to let it pass unnoticed than to attempt to correct it.

It is a common practice to tell a witness, over and over again, to mind he is upon his oath. Few witnesses bear this repeated admonition patiently. But when used in moderation, and free from an angry tone, the witness has no reason to complain of it, for it is known that some persons will *say* what they will not *swear*.†

"A cause was tried in the Court of Session, where the principal fact to be ascertained was, whether a ship-master, who used to frequent the Western Highlands and Isles, was drowned in one particular year, or in the year after. A great number of witnesses from those parts were examined on each side, and swore directly contrary to each other upon this simple question. One of them, a very respectable chieftain, had previous to this public examination, not only said, but attested under his hand, that he had seen the ship-master in the year subsequent to that in which the court was finally satisfied he was drowned. When interrogated with the strictness of judicial inquiry, and under the awe of an

* Hor., Serm. i. 9, 20.

† [See in the Appendix, *post*, some valuable suggestions for the conduct of examinations of witnesses.]

oath, he recollected himself better, and retracted what he had formerly asserted, apologising for his inaccuracy by telling the judges, 'A man will *say* what he will not *swear*.' By many he was much censured, and it was maintained that every gentleman would be as attentive to truth without the sanction of an oath as with it." *

This last observation may be true in the case of a gentleman, and of many other persons, when they speak considerately; but if they are telling their tale thoughtlessly, without proper reflection and caution, it may be serviceable to themselves, as well as to the cause of truth, to put them in mind they are speaking "under the awe of an oath."

The importance and use of an oath are thus adverted to by Archbishop Secker in one of his sermons upon oaths:—"It must be owned great numbers will certainly speak truth, without an oath; and too many will not speak it with one. But the generality of mankind are of a middle sort; neither so virtuous as to be safely trusted, in cases of importance, on their bare word; nor yet so abandoned, as to violate a more solemn engagement. Accordingly, we find by experience that many will boldly say, what they will by no means adventure to swear; and the difference, which they make between these two things, is often indeed much greater, than they should; but still it shows the need of insisting on the strongest security. When once men are under that awful tie, and, as the Scripture phrase is, have bound their souls with a bond (Numb. xxx. 2), it composes their passions, counterbalances their prejudices and interests, makes them mindful of what they promise, and careful of what they assert; puts them upon exact-

* Life of Johnson, by Boswell, vol. v. p. 141, ed. 1835.

ness in every circumstance: and circumstances are often very material things. Even the good might be too negligent, and the bad would frequently have no concern at all, about their words, if it were not for the solemnity of this religious act. And a farther advantage of it is, that when we have thus had the strongest assurance given us, which we can have, concerning any matter, we are naturally disposed to acquiesce in it; and an oath for confirmation becomes the end of all strife (Heb. vi. 16)." *

It may be a peculiarity of a witness, not to like to be stopped in a story he is telling. "You shall hear," said the Jockey; but I have one thing to beg of you, which is, that when I have once begun my history, you will not interrupt me with questions; I don't like them, they stops one, and puts one out of one's tale, and are not wanted; for any thing which I think can't be understood, I should myself explain, without being asked."† Sancho Panza, a thoroughly good-tempered fellow, came quite to a stand, when interrupted in his story of the goats passing the river.‡

If a question may give pain to a witness, as it may do if it touch some chord of sorrow occasioned by death, that of a child or parent; or if it touch on some failing or misconduct of the witness himself, or of his relative or friend; the question should be waived, if possible: but if inevitable, any seeming unfeelingness in it will be avoided, and the sharpness of it much abated, by introductory expressions, deploring the necessity of asking it, and representing it as an unwelcome and imperative exercise of duty. Cicero, in his own

* Secker's Sermon's, vol. iv. p. 232, ed. 1771.

† Borrow's Romany Rye, vol. ii. p. 125, ed. 1857.

‡ Don Quixote, vol. i. ch. xx.

person, furnishes an admirable instance of this considerate feeling. In his defense of Cluentius, part of the charge against whom was, that of having poisoned a son of one of the witnesses, he thus speaks,—"I deny that this young man, who you say died immediately after drinking from the cup, died on that day at all. It is a great and impudent falsehood. Look at the facts. I say that he came to the dinner unwell, and, with the imprudence of youth, indulged too much at it; that he was ill for some days after; and so died. Who is the witness that speaks to this? he who mourns for his death,—his father; his father, I say, who, from his parental distress, would rise from the place where he is sitting, to witness against Cluentius, if he had the slightest suspicion of his guilt; he, by his testimony, acquits him. But [addressing the father] stand up, I pray, a moment, while, however painful it may be, you repeat this necessary evidence; in the course of which I will not detain you long; you have acted most righteously, in not suffering your sorrow to favor a false charge against a man who is innocent." *

It is the cross-examination, however, which gives a witness (an honest one is still meant) the most trouble: here he falls into the hands of an enemy.

The witness, when he goes to be examined, takes it for granted he is about to relate certain of the facts, from which the pending issue proceeds, and these facts only; and it never enters into his head, that questions will be put to him about events and matters which form no part of his story, and which perhaps happened years ago, and long before the present subject of inquiry had any existence. Such questions are, however, every day put, and of course they take the witness by surprise;

* Cic. Pro Cluentio, 60.

and he is often not prepared on a sudden to recollect the matters so inquired into, and consequently any difficulty he felt before in giving his evidence may by this means be tenfold augmented. On such an unexpected question being asked, it may well pass in his mind,—"I can say little more than I have studied, and that question's out of my part." *

In a prosecution for high treason, a witness for the Crown would not expect to have questions put to him (as on Crossfield's trial they were put to the witness Winter) relating to a superstitious story, which about, as the witness fancied, a bewitched hare he was in the habit of telling; a story having nothing to do with the trial, except as it might affect the witness's credit, by suggesting his mental incapacity. "Do you remember any thing about the story of a hare; perhaps you may think it odd you should be asked that question?" In this manner was the subject introduced to the witness.†

In a case of high treason, a witness for the Crown would not expect to be interrogated (as on Hardy's trial the witness Alexander was) about different masters he had lived with, a quarrel he had with one of them; and about different visits (ordinary family visits) he had paid to his aunts; these things having nothing to do with the trial, except for the purpose of inferring, that, because the witness's memory was weak on these points, it was not likely he could remember, as according to his evidence he did, a speech he had heard at a political meeting.‡

"Butler was placed at the table for examination.

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* Twelfth Night.

† Crossfield's Trial (taken by Gurney), p. 120.

‡ Hardy's Trial (taken by Gurney), vol. ii. pp. 227, 240.

With a frankness which at once became his calling and character, Butler avowed his involuntary presence at the murder of Porteous, and entered into a minute detail of the circumstances, which attended that unhappy affair. All the particulars were taken minutely down from Butler's dictation. When the narrative was concluded, the cross-examination commenced, which is a painful task even for the most candid witness to undergo, since a story, especially if connected with agitating and alarming incidents, can scarce be so clearly and distinctly told, but that some ambiguity and doubt may be thrown upon it by a string of successive and minute interrogatories." *

The prospect of a cross-examination has even terrified a Chief Justice of Ireland. Mr. Phillips, in his book on "Curran and his Cotemporaries," gives this anecdote in his notice of Chief Justice Bushe:—"There were occasions on which he was actually timid. Never shall I forget the state of nervous excitement, into which he worked himself, on being summoned to give evidence before the Irish Committee in the House of Lords in 1839. I think I see him at this moment as I saw him then, hawking his carpet-bag full of documents up and down the corridors, now walking himself out of breath, now pausing to recover it, now eyeing the bag, on which he much counted, and again gazing about in absolute bewilderment. At last, in much perturbation, he exclaimed,—'the character of a witness is new to me, Phillips. I am familiar with nothing here. The matter on which I come is most important. I need all my self-possession; and yet I protest to you, I have only one idea, and that is, *Lord Brougham cross-examining me.*'" †

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* Heart of Mid-Lothian.

† Phillips' Curran and his Cotemporaries, p. 443, 4th ed.

It is to be feared that an object of a cross-examination too often is, to raise a laugh, or to betray ignorant witnesses into confusion and trifling mistakes. It frequently happens, that innocently enough, and through sheer bewilderment, the witness utters mistakes and contradictions, dangerous, if not fatal, to his credit, and, as a consequence, putting justice in peril:—"Young Fulcher, however, got off. . . . . He gave counsellor P. one and twenty shillings to defend him; who so frightened the principal evidence, a plain honest farming-man, that he flatly contradicted what he had at first said, and at last acknowledged himself to be all the rogues in the world, and, amongst other things, a perjured villain." *

The temper of a witness is often tried, and his feelings hurt, by his cross-examination on his past conduct. He may have been charged with this or that offense; he may have been in prison. Questions on these matters are often properly put, with a veiw to see how far the witness is now entitled to credit; yet if the conduct inquired into is that of some years ago, and thus unlike-

* Borrow's Romany Rye, vol. ii. p. 140, ed. 1857. [Trench, in his Realities of Irish Life, in describing a trial for the murder of one Hall, thus pictures the cross-examination of a witness, who, together with the prisoner on trial, had been hired to commit the murder. "After the witness had detailed how he had himself undertaken to be the murderer, and had twice stolen behind Mr. Hall for the purpose of shooting him in the back, and had only given up his design because he fancied it was '*unlucky*,' the prisoner's counsel said, 'then, it was not your conscience which smote you?' 'Not a bit!' replied the man. 'And you stole up behind the poor old gentleman to shoot him for money?' said the lawyer. '*I did*.' 'I suppose you would do any thing for money?' '*I would*,' replied the man, quite unappalled and growing desperate. The lawyer still continued to excite him: 'You would shoot your *father* for money, I suppose?' 'I would,' exclaimed the man furiously. '*Or your mother?*' '*I would*.' '*Or your sister?*' '*I would*.' 'Or your *brother?*' continued the counsel. 'Ay, or yourself either!' cried the infuriated ruffian, almost leaping from his chair," &c.]

ly to injure his credit now, it may be great and needless cruelty to bring again to light such bygone stains on his character.

Archbishop Whately, in his Annotations on Lord Bacon's Essay on Judicature, expresses the following opinion on different modes of examining a witness:— "I think that the kind of skill, by which a cross-examiner succeeds in alarming, misleading, or bewildering an honest witness, may be characterized as the most, or one of the most, base and depraved of all possible employments of intellectual power. Nor is it by any means the most effectual way of eliciting truth. The mode best adapted for attaining this object is, I am convinced, quite different from that, by which an honest, simple-minded witness is most easily baffled and confused. I have seen the experiment tried, of subjecting a witness to such a kind of cross-examination by a practical lawyer, as would have been, I am convinced, the most likely to alarm and perplex many an honest witness, without any effect in shaking the testimony; and afterward, by a totally opposite mode of examination, such as would not have at all perplexed one, who was honestly telling the truth, that same witness was drawn on, step by step, to acknowledge the utter falsity of the whole. Generally speaking, a quiet, gentle, and straightforward, though full and careful, examination will be the most adapted to elicit truth; and the manœuvres, and the brow-beating which are the most adapted to confuse an honest, simple-minded witness, are just what the dishonest one is the best prepared for. The more the storm blusters, the more carefully he wraps round him the cloak, which a warm sunshine will often induce him to throw off." *

* Bacon's Essays, with Annotations by Archbishop Whately, p. 495, ed. 1856.

"Give him fair play," said Lord Chief Justice Eyre to Erskine, when, on Hardy's trial, he was worrying the witness Alexander.*

Except in the case of a dishonest witness, one prepared to trifle with his oath, a witness may justly put in, and stand on, a right to receive courteous, or at least inoffensive, treatment at the hands of his examiner. In his character of witness he is a servant to justice; by the sacredness of an oath he binds himself to speak the truth; and while he fulfills the duty so imposed on him, he is entitled to the respect, which, by the usage of society, the observance of any duty commands and receives.

It is not right, in a question to a witness, to address him by, or to apply to him, a name, which, in a common acceptation of it, implies dishonor or disgrace.† In a question to him, it is not right, and as it would seem not lawful, to call him a spy, a character commonly of bad odor. On the trial of Hardy, one of the questions put by Erskine in cross-examining the witness Alexander, was,—"Then, in plain English, you went there [a meeting of the London Corresponding Society] as a spy; did you not?" ‡ This question passed without observation; but later in the trial, when Erskine applied the same reproachful word to another witness, Sanderson, the expression was thus objected to:

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* Hardy's Trial (taken by Gurney), vol. ii. p. 239.

† [The somewhat celebrated case of Thellwall *v.* Yelverton, was an action in form for necessaries supplied to the alleged wife of the defendant; but which was really to test the legality of the defendant's marriage. The alleged wife was a Miss Longworth, but she was known as, and called herself, Mrs. Yelverton, being examined as a witness on the trial, one of the counsel addressed her as Miss Longworth; on her objecting to this the court ruled that counsel must address her as Mrs. Yelverton.]

‡ Hardy's Trial (taken by Gurney), vol. ii. p. 229.

"*Erskine.* What date have you taken, good Mr. Spy?

Lord Chief Justice Eyre. These observations are more proper, when you come to address the jury.

Mr. Attorney General (*Sir John Scott*). Really that is not a proper way to examine witnesses. Lord Holt held strong language to such sort of an address from a counsel to a witness, who avowed himself a spy." *

On the late trial of Bernard, part of the cross-examination by Mr. Edwin James (now of the New York bar) of the witness Rogers, of the detective police, raised the following discussion on applying the term spy to a witness during his examination:

"*Mr. James.* Did you go there as a spy?

Rogers. I went by the direction of the Commissioners of Police to attend a public meeting there.

Mr. James. What did you go there for?

Rogers. To take notes of who were there, and what was said.

. . . . . .

Mr. James. You went there as a spy, didn't you?

The Attorney General. It would be fairer for the witness, as well as to those who sent him, if you were to ask what his instructions were.

Mr. James. Well, what were your instructions?

. . . . . .

Did you go as a spy?

The Chief Justice (*Lord Campbell*). You had better get the facts from him, and you can draw any inference you please.

Mr. James. It is a plain English question, and I submit that I may ask it.

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* Hardy's Trial (taken by Gurney), vol. ii. p. 335.

The Attorney General objected to it.

Mr. James. The same question has been put before, as your lordships know, in state trials. I contend I am entitled to put the question, did you go there as a spy?

The Chief Baron. If an objection be taken, the point had better be discussed in regular form.

The Attorney General. I submit that my learned friend has no right to put a question, the affirmative answer to which would bestow an opprobrious name upon the witness, and upon those who instructed him. My learned friend has a right to inquire minutely into all that the witness has done or said—

The Lord Chief Justice. And into all the directions he received.

The Attorney General. I was going to add, and into all and every direction that he received. But I conceive that he has no right whatever to put a question, that embodies his own description of something, that may or may not have taken place. . . . . I submit the question is altogether irregular, and contrary to the law and practice of the courts.

Mr. James. I contend that I am entitled to put this question. On Hardy's trial the question was put by Mr. Erskine in these terms,—"Then, in plain English, you went there as a spy?" and it was not objected to.

The Lord Chief Justice. Then there was no decision.

Mr. James. I do not say that there was a decision, but that trial was presided over by the highest authorities. That question was not objected to by the then Attorney General, and no remark was made upon it by the judges.

The Chief Baron. But on the present occasion the

question is objected to, and we are called upon to decide the point.

Mr. James. I submit that I am entitled to put the question. The witness may decline to answer it, if he pleases; that is another matter.

The Lord Chief Justice, after consulting with the other learned judges (the Chief Baron Pollock, Mr. Justice Erle and Mr. Justice Crowder), said,—The question being objected to, I am of opinion that it is irregular—not on the ground that the witness is called on to criminate himself, and may refuse to answer; but on the ground that he is called upon to draw an inference from the facts. It will be open to Mr. James to denominate the witness as a spy hereafter if he think fit; but I am of opinion that he cannot ask the witness, 'Now, did you go as a spy?' He may ask under what directions he went, for what purpose he went, what he did when he was there, what report he afterward made to those who employed him; and those facts being ascertained, he may apply the term 'spy,' if he pleases, to the person who so acted. But I am of opinion, that the question, 'Then you went as a spy?' is not regular, and that it cannot be properly put." *

From an unwilling, dishonest witness, one that is prepared to trifle with his oath, it is, as it may be expected, often difficult, very difficult, to get the answer desired, and which it is in his power to give. He is aware of the object of the examination, he knows the exact answer that is fished for, and he exerts all his skill and cunning not to come within the net spread out for him. He is obliged to come very near, all but in it. But so long as he can, he keeps pertinaciously clear of it. To a series of questions, sorely pressing him,

* The London Times, April 14, 1858.

and increasing in power as they proceed, he answers evasively, sometimes as if he did not understand the question, or as if the question were quite different from what it is. So long as he is able, he imitates the poor maniac Madge Wildfire, by laughing in his sleeve, and saying to himself—"catch me if you can:"

"Pursuing the path which Madge had chosen, the thatched roofs of houses were seen embosomed in a tuft of trees at some distance. The track led in that direction, and Jeannie, therefore resolved, while Madge continued to pursue it, that she would ask her no questions; having had the penetration to observe, that by doing so she ran the risk of irritating her guide or awakening suspicions.

Madge, therefore, uninterrupted, went on with the wild disjointed chat, which her rambling imagination suggested; a mood in which she was much more communicative respecting her own history, and that of others, than when there was any attempt made, by direct queries, or cross-examinations, to extract information on these subjects.

'It's a queer thing,' she said, 'but whiles I can speak about the bit bairn and the rest of it, just as if it had been another body's and not my ain; and whiles I am like to break my heart about it—Had you ever a bairn Jeannie?'

Jeannie replied in the negative

'Ay; but your sister had, though—and I ken what came o't too.'

'In the name of heavenly mercy,' said Jeannie, forgetting the line of conduct, which she had hitherto adopted, 'tell me but what became of that unfortunate babe, and'—

Madge stopped, looked at her gravely and fixedly,

and then broke into a great fit of laughing—'Aha, lass,—catch me if you can—I think it's easy to gar you trow ony thing. How suld I ken ony thing o' your sister's wean?'" *

An unwilling witness will sometimes make up his mind, that, if possible, he will not give the answer desired, unless a question pointed direct to the answer is put to him. When Bertram Risingham comes to Oswald Wycliffe from the battle of Marston Moor, and is giving him some account of the fight, he very well knows, that what Wycliffe chiefly wishes to know is, that Philip of Mortham fell in it. But Bertram will have the question put to him "in simple terms and plain;" and until it is so put,—"Philip of Mortham, lives he yet?"—Bertram keeps Wycliffe in suspense:

> "In vain
> He strove, by many a winding train,
> To lure his sullen guest to show,
> Unasked the news he longed to know." †

To overcome an unwilling, dishonest witness may require that the interrogator have more than ordinary sagacity, have great experience in the examination of witnesses, and be possessed, besides, of ever enduring patience, and a temper proof against discomposure. The obstinacy of such a witness may sometimes be surmounted by putting him off his guard, through the introduction of some subject, which will amuse his mind, and for the moment withdraw his attention from the point of his examination, and make him forget his purpose of resistance. This is consonant with a point of artifice mentioned by Lord Bacon in his Essay on Cunning; which is, "that when you have any thing to obtain of present dispatch, you entertain and amuse the

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* Heart of Mid-Lothian. † Rokeby, canto i. st. 10, 12, 14.

party, with whom you deal, with some other discourse, that he be not too much awake to make objections. I knew, he says, a counsellor and secretary, that never came to Queen Elizabeth with bills to sign, but he would always first put her into some discourse of state, that she might the less mind the bills."

Such a witness may also be surprised into an answer. In the same Essay on Cunning, Lord Bacon says,—"A sudden, bold, and unexpected question doth many times surprise a man, and lay him open. Like to him, that, having changed his name, and walking in Paul's, another suddenly came behind him, and called him his true name, whereat straightways he looked back."

In the following conversation, the thing wanted to be known was disclosed by an expression hastily used:—

"What do you think of this affair between Lord E. and his brother?

What affair?

Why, you know the news, surely. F. T. turns out as brave a fellow as any of us; for instead of having run away, he was at the moment engaged in an attempt to murder his brother, or cousin, or some such near relation.

I believe you are misinformed.

I am told one J. acted as a second to them both on the occasion.

Sir! you are misinformed; Captain J. knew nothing of any such matter as you refer to. I am Captain J.

I guessed as much before. I only wished to let you know what the world may say.

The world may tell what lies it pleases; but I was not present at the rencontre between E. and T.; I was some hundred miles off.

There now, there *was* a rencontre between them—the very thing I wanted to know.

I desire you will found nothing on an expression hastily used to vindicate myself from a false aspersion. I only meant to say, if there was an affair, such as you talk of, I knew nothing of it." *

In the case of O'Coigly, O'Connor, and others, tried in May, 1798, for high treason, one of the witnesses for the Crown, Hugh Bell, plainly an unwilling witness, proved that the direction of a letter, dated the 24th February in the same year, was in his own handwriting; but the Attorney General (Sir John Scott) failed in his attempt to make him say, at whose instance he wrote the address; although, under the circumstances, it was next to impossible the witness could, in so short a time, have forgotten it. The object of the Attorney General was, to prove that he wrote the direction at the instance of Mr. O'Connor, one of the prisoners.

The following is the examination on this point:—

"Q. Did you direct any letter, at the instance of Mr. O'Connor, upon Saturday the 24th?

A. Not that I recollect.

Q. Look at that direction; is not that your handwriting?

A. It is.

Q. At whose instance did you write that address upon that letter?

A. That I cannot tell.

Q. Mr. Bell, you are a merchant in Charterhouse-square—you have directed a letter, which bears date the 24th of February, to Mr. William Williams—do you mean to say you cannot tell at whose instance you directed it?

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* St. Ronan's Well.

A. I do, for I have no recollection of directing it at all; nor should I know that I ever had directed it, but that I know my own handwriting.

Q. You mean to swear, that if it was not for its being your own handwriting, you should have no recollection that you ever directed it?

A. Positively.

Q. You do swear it is your handwriting, and that you did direct it?

A. Yes, from its being my handwriting.

Q. Have you any correspondent of that name?

A. None.

Q. Why, Mr. Bell, have you never said at whose instance you directed it?

A. I never have.

Q. You, however, did direct that letter?

A. I directed it.

Q. Pray, Mr. Bell, do you know a person of the name of William Williams?

A. I do not.

Q. Do you mean to say, then, that you addressed that letter, 'Mr. William Williams, Fountain Inn, Canterbury,' so lately as February, 1798, but that you have not the least recollection how you came to address that letter?

A. I direct a great many letters every day of my life; and if this letter, or any other, was brought to me by a servant, or any body else, to direct, I should do it with a great deal of pleasure, and it would make no impression, probably, upon me—in this case it has not." *

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* Trial of O'Coigly and others (taken by Gurney), pp. 87, 183, 184, 197, 500.

The treatment which an unwilling, dishonest witness would receive at the hands of Curran, is thus described by Phillips:—"At cross-examination, the most difficult, and by far the most hazardous part of a barrister's profession, he [Curran] was quite inimitable. There was no plan which he did not detect, no web which he did not disentangle; and the unfortunate wretch, who commenced with all the confidence of preconcerted perjury, never failed to retreat before him, in all the confusion of exposure. Indeed, it was almost impossible for the guilty to offer a successful resistance. He argued he cajoled, he ridiculed, he mimicked, he played off the various artillery of his talent upon the witness; he would affect earnestness upon trifles, and levity upon subjects of the most serious import, until at length he succeeded in creating a security that was fatal, or a sullenness that produced all the consequences of prevarication. No matter how unfair the topic, he never failed to avail himself of it; acting upon the principle that, in law as well as in war, every stratagem was admissible. If he was hard pressed, there was no peculiarity of person, no singularity of name, no eccentricity of profession, at which he would not grasp, trying to confound the self-possession of the witness by the, no matter how excited, ridicule of the audience." *

In the case of an unwilling, dishonest witness, it is plain it is in his power to keep the truth to himself; no question, no skill, no artifice, may be able to extract it from him. What reply can be given to—"I don't recollect," "*non mi ricordo*"? And if, instead of being humored and coaxed, he meets with censure in severe language and manner, he is very likely to harden his forehead, and bid defiance to his opponent, presenting

* Phillips' Curran and his Cotemporaries, p. 80, 4th edit.

against his attack the simple defense of, "I have no recollection of the matter": He will say with Iago,

> "Demand me nothing: what you know, you know:
> From this time forth I never will speak word." *

* Othello, A. v. S. 2.

CHAPTER XII.

OF ADVOCACY.

A PERSON can seldom be advised to plead his own cause, when the aid of a professional advocate can be obtained. If he be not himself a lawyer, he will be sure to meet with some, and very probably many, difficulties. He will find himself unacquainted with the knowledge, which, for his advantage, he ought to have of the law of evidence, and of the rules by which the examination of witnesses is governed, rules laid down for promoting the discovery and proof of truth. From inexperience he may not be able to arrange his evidence in the manner to be the most serviceable to him; and he may not see where his evidence is strong, and where weak; and consequently he may fail to push his advantage where the testimony for him is the most favorable, and to make the most of it where it is defective. In the conflict of the trial he may miss seeing advantages he has gained, and lose sight of the ground, where the strength of his own side mainly lies. Advantages obtained he may lose by subsequent questions he puts to witnesses, whose answers may weaken or, perhaps, wholly efface the superiority he had won.

Calmness and temper are required in any one, who would successfully examine witnesses. These qualities it may be difficult for one pleading his own cause to maintain, even in examining his own witnesses; and they will be put to a much severer test, when he comes to cross-examine the witnesses of his adversary. The latter are naturally in some degree in antagonism with

him, a circumstance in itself very unfavorable to composure of mind, both on the side of the examiner and of the witnesses. And if among these witnesses, there be any one, between whom and himself there exists some unfriendly feeling, a mutual dislike, quite unconnected although it be from the subject of the trial, this unhappy accident can hardly fail to cause him some, and probably great, inconvenience and trouble. The strife of cross-examination is rough, and its rubs and hits are dangerous to the retention of patience and temper.

Supposing on a criminal trial the prisoner's character, independently of the present charge against him, is bad; and supposing in the course of the evidence this unpropitious fact comes out; then if the accused pleads his own cause, there, in the dock, he stands, full in view of the jury, in close converse, it may be said, with them, he speaking to them, they listening to him; no screen between them to intercept the admission of dislike, disgust, which his countenance, his manner, his past bad character, may tend to inspire; in such a case, it is plain his pleading for himself encumbers him with difficulties, which would, partially at least, be avoided, if an advocate stood up in his defense. The advocate then would be the prominent person; it is his countenance, his manner, the jury would look at; and the presence of the prisoner would be shaded by him.

"Un loup disoit que l'on l'avoit volé :
Un renard, son voisin, d'assez mauvaise vie,
Pour ce prétendu vol par lui fut appelé.
Devant le singe il fut plaidé,
Non point par avocats, mais par chaque partie."

There was the mischief; neither side retained counsel. Mark the result,—Each side was fined:—

"Après qu'on eut bien contesté,
Repliqué, crié, tempêté,

Le juge, instruit de leur malice,
Leur dit: Je vous connois de long-temps, mes amis;
Et tous deux vous paîrez l'amende:
Car toi, loup, tu te plains, quoiqu'on ne t'ait rien pris;
Et toi, renard, as pris ce que l'on te demande." *

This case has occurred:—A man on his trial for murder pleaded his own cause. A principal witness against him was a young woman, who, at the time of the crime imputed to him, lived with him as his housekeeper. Her he had seduced, and promised to marry; a promise he did not fulfil. During her examination her sight of the prisoner caused her great distress: she rarely looked at him, but when she did so for a moment, her tears began to flow, and her voice was choked by emotion, so as to be almost inaudible. At the commencement of the prisoner's cross-examination of her, she, after a momentary embarrassment, eyed him firmly. Her examination in two days lasted many hours, during which she twice retired to suckle her child, of which the prisoner was the father. Some questions which he asked her, relating to the connection which had subsisted between them, greatly agitated her, and provoked this reproachful reply,—"You had promised me marriage;" and (weeping bitterly) "you must do this to wound my feelings." And later in the examination he met with this withering rebuke from her,—"I told you, when you broke your promise, that, before you died, you would repent of not keeping your word. I told you, that you would never prosper, after breaking such a promise." The prisoner was—Rush. † If ever there was a case in which it was important the prisoner's presence should be shaded, it was this of Rush.

Irrelevant matters, having no bearing whatever on

* Fables de La Fontaine, ii. 3. According to Phædrus, the fox overdid his defense: "*Te credo surripuisse, quod pulchrè negas.*"—*Ph Fab.* i. 9.

† *The London Times*, March 31st and April 2d, 1849.

the real issue of the case, are almost sure to be brought into the examination of witnesses, by an inexperienced person pleading his own cause. In every-day life it is a common fault to bring into a story things which have little or nothing to do with it; just as Sancho Panza wove into his tales his strings of inapplicable proverbs, to the great annoyance of Don Quixote impatient of this trifling. The introduction of irrelevant matters into a cause cannot fail to augment the difficulty which a jury has in disentangling the intricacies of a case; and whatever increases their difficulty may in proportion injure a pleading which stands in need of clearness and simplicity for its success.

A person pleading his own cause, whether by thinking he cannot say too much, or by being carried away by his feelings, or for some other reason, is very liable not to reflect, that oftentimes it is best to "let well alone," as the saying is, and silence is more useful than speech. This was Pliny's opinion.*

A droll note by Pepys, in his Diary, shows he was fully aware it is sometimes discreet to be silent. The 15th December, 1665, he makes this entry,—"Met with Sir James Bunce. 'This is the time for you,' says he, 'that were for Oliver heretofore; you are full of employment, and we, poor cavaliers, sit still and can get nothing;' which was a pretty reproach, I thought; but answered nothing to it, for fear of making it worse."

A disadvantage attending a person pleading his own cause, whether on a civil or criminal trial, is, that he cannot speak favorably of himself with the same grace with which an advocate, who may be taken as his friend, can do. "How many things are there,

* It is as much the duty of an advocate sometimes to say nothing, as it is on other occasions to make a long speech; and, indeed, I remember some criminal cases in which I defended my client better by saying nothing than I should have done by a most elaborate oration.—*Epist.* vii. 6.

which a man cannot, with any face or comeliness, say or do himself. A man can scarce allege his own merits with modesty, much less extol them: a man cannot sometimes brook to supplicate or beg; and a number of the like: but all these things are graceful in a friend's mouth, which are blushing in a man's own." * Advice like this Solomon thought worthy to be recorded, as among his Proverbs we read,—"Let another man praise thee, and not thine own mouth; a stranger, and not thine own lips."

A party to a law suit may know more of the subject of it, and of the science, art, or other branch of knowledge bearing upon it, than any one in the profession of the law, and yet he may not be able to support his own cause with the clearness, skill, power, and efficiency, with which the professional advocate will sustain it. Let the advocate already possess, or be supplied for the occasion, whether by the client himself, or from any other source, with the knowledge necessary to the end in view, and the advocate will for this purpose make more of it, turn it to a better account, than the client himself could do. An opinion of this sort Cicero puts into the mouth of Crassus, and it may fairly be taken to be that of Cicero himself; supposing at the same time the advocate be, in Crassus and Cicero's meaning of the word, an *orator*.†

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* Bacon's Essay on Friendship.

† If an orator is ignorant of certain arts and sciences, and is acquainted only with the usual subjects debated in the forum or elsewhere, yet if he is called upon to speak on those arts or sciences, and shall be instructed in them by professors of them, he will speak much better on these subjects than the very persons, who taught him, will be able to do. Thus, if Sulpicius is required to speak on a military subject, he will seek information from Marius; and, after he has obtained it, he will make such a speech on military affairs, that, to Marius himself, Sulpicius will appear to know more of the subject than even Marius does. So, again, if Sulpicius has occasion to

"At this time (1759), there being a competition among the architects of London to be employed in the building of Blackfriars Bridge, a question was very warmly agitated, whether semicircular or elliptical arches were preferable. In the design offered by Mr. Mylne, the elliptical form was adopted, and therefore it was the great object of his rivals to attack it. Johnson's regard for his friend Mr. Gwyn induced him to engage in this controversy against Mr. Mylne; and after being at considerable pains to study the subject, he wrote three several letters in the Gazetteer, in opposition to his plan. If it should be remarked, that this was a controversy which lay quite out of Johnson's way, let it be remembered, that, after all, his employing his powers of reasoning and eloquence upon a subject, which he had studied on the moment, is not more strange than what we often observe in lawyers, who, as *Quicquid agunt homines* is the matter of law-suits, are sometimes obliged to pick up a temporary knowledge of an art or science, of which they understood nothing till their brief was delivered, and appear to be much masters of it."*

Gray says very truly in a letter to his friend West, who could not force his inclination to like the study of the law, and to dissuade him from being disgusted with

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speak on law, he will communicate with you, Scævola; and after you, a most learned and experienced man, have taught him law, he will, so far as speaking upon law goes, surpass even yourself, who instructed him. And so if it happen that Sulpicius is to discourse on human nature, particular vices of mankind, pain, death, he will, if he shall think it befitting him (for an orator ought to be familiar with these topics), consult Sextus Pompeius, a man learned in philosophy. And in any case, let the subject be what it may, Sulpicius certainly will accomplish this,—that, whatever subject he shall have been taught, on this he will speak much more eloquently than he, from whom he learnt it, can hope to do.—*Cic.*, *De Oratore*, i. 15.

* Life of Johnson, by Boswell, vol. ii. p. 115, ed. 1835.

its dry and unentertaining elements,—"It is strange, if, among all that huge mass of words, there be not somewhat intermixed for thought. Laws have been the result of long deliberation, and that not of dull men, but the contrary; and have so close a connection with history, nay, with philosophy itself, that they must partake a little of what they are related to so nearly."*

It may not be too bold to assert, that "the sparks of all sciences in the world are covered in the ashes of the law."†

For the purpose of addressing the jury, and also for the examination of witnesses, and especially their cross-examination, it is essential that an advocate possess at the time of the trial a competent general knowledge of the science, art, trade, or other subject involved in the question in the cause, and an intimate acquaintance with such particulars of the subject as the question immediately touches, and quickness in making use of them, and turning them to account. These particulars may be,—Materials used in any branch of trade, the process of a particular manufacture, custom and practice in commercial dealings and affairs, agricultural works, ships, railways, mines, quarries, medicines, poisons, chemistry, surgery; and the technical, peculiar, and provincial words and phrases confined to, or in use upon, each particular subject.

Sir Edward Coke has left us his opinion, that some knowledge of every science and art is, not only useful, but even necessary to a lawyer.‡

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* Gray's Works, vol. i. p. 254, ed. 1807. † Finch., Book i. ch. iii.

‡ If it be asked, of what arts and sciences a knowledge is necessary for a full knowledge and understanding of our laws; I answer, that since not only laws, but also all arts and sciences, are subjects of jurisprudence, I not only do not exclude any art or science, but I consider a knowledge of every one of them not only useful, but even essential to a lawyer.—*Preface*

It is a common saying,—"One tale is good, till another be told." And hence the common and useful advice,—*audi alteram partem;* hear the other side. The story of the highway robbery by Prince Henry and his "wonted followers" had two sides; and Falstaff's version of it dissolved before that of Prince Henry: "Mark now," said the Prince to Falstaff, "how plain a tale shall put you down."* The relation of the other side of a tale completely cleared Sir Thomas More from the imputation of having, when Lord Chancellor, received a gift as a bribe. One Parnell made a complaint, that a decree had been improperly obtained by his adversary Vaughan, whose wife, he said, had bribed the Chancellor by a gilt cup. Hear the other part of the tale, said More. He then acknowledged that he received the cup as a new year's gift; and that having drunk to the lady of wine, with which his butler had filled the cup, she having pledged him, he restored the cup to her, and would listen to no refusal from her to take it back again.†

To Sir Roger de Coverley viewing his own portrait, painted for the sign of an inn, and altered to the Saracen's Head, and pressing Mr. Spectator to say, whether the head was not still more like himself than a Saracen, the prudent reply was, that "much might be said on both sides."‡

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to Co. Rep. part iii. [Chief Justice Parsons used to say that many persons wondered at his studying all sorts of things, and supposed this diversity of pursuits must interfere with his profession; the contrary, however, was true, for there was scarcely any thing which he had learned, particularly if it were of a scientific character, which he did not find, at some time or in some way, useful to him as a lawyer or as a judge.—*Memoirs of Chief Justice Parsons*, p. 153.]

* Henry IV. part i. A. ii. S. 2, 4.

† Life of Sir Thomas More, in vol. i. of Mackintosh's Miscellaneous Works, p. 466, ed. 1846.

‡ The Spectator, No. 122.

On most questions the same may be pronounced with equal propriety and truth. There is hardly any subject, of which two and opposite views cannot be, and are not, taken; and certainly no subject, which can possibly lead to a trial or other judicial inquiry, is exempt from this prevailing tendency to opposition.

In every cause, each of the opposite parties thinks, or at least wishes to make it appear, he has right on his side, and that wrong abides with his adversary. They will not hesitate to say, as Plantagenet and Somerset did say, when they plucked the white and red roses in the temple garden,—

> "*Plantagenet.* The truth appears so naked on my side,
> That any purblind eye may find it out.
> *Somerset.* And on my side it is so well apparell'd,
> So clear, so shining, and so evident,
> That it will glimmer through a blind man's eye." *

If this be so, each side has, or claims to have, much to say in the assertion or vindication of its own view of the question in dispute. And if the parties themselves in strife abound in arguments and remarks, whether to assail or defend, it is to be expected that an advocate, engaged for the very purpose, will find expressions to enforce the views of his client; arguments and remarks wherewith to enforce his real or supposed rights, or to defend him against real or supposed wrongs.

Gay dedicates one of his fables expressly "To a Lawyer;" and opens it with a pleasantry on a lawyer's flexibility in the construction of language:

> "I know you lawyers can with ease,
> Twist words and meanings as you please;
> That language, by your skill made pliant,
> Will bend to favor every client;
> That 'tis the fee directs the sense,

* Henry VI., A. ii., S. 4.

To make out either side's pretence.
When you peruse the clearest case,
You see it with a double face;
For scepticism's your profession;
You hold there's doubt in all expression.
Hence is the bar with fees supply'd;
Hence eloquence takes either side."

An advocate must have learnt his duty very imperfectly, or have reflected upon it very little, who, employed for the prosecution to lay the facts of the case before the jury, will venture to insert amongst them any fact of his own invention. Nevertheless, there is an instance recorded of this having been actually done; and the best excuse, if any can be made, for such a misdeed, is, that the advocate was, as he himself says, "rather young at the bar," and had no doubt of the prisoner's acquittal. The prisoner was, however, found guilty. The facts invented were sworn to by the prosecutrix; what those facts were are not recorded, and whether or how far they had any influence on the jury in finding their verdict we are not told; and beyond the jury this was probably never known. The case affords a strong warning against such temerity on any other occasion. The following is the substance of the circumstances, as detailed by the injudicious advocate himself:—"Mr. K. had been accused of a capital crime by a Miss B., who stated that she had gone away with him for the purpose, and in the strict confidence, of being married the same day. The grand jury, on the young woman's testimony, found a true bill against him for the capital offense, and he came to Carlow to take his trial at the assizes. He immediately called on me with a brief,—said it was a mere *bagatelle*, and totally unfounded, and that his acquittal would be a matter of course. I had been retained against him. He made so light of the business, that he told me to get up a famous speech against him, as no doubt I was

instructed to do; that indeed I could not say too much, as the whole would appear, *on her own confession*, to be a conspiracy! On reading my brief, I found that, truly, the case was not over strong against him even there, where, in all probability, circumstances would be exaggerated; and that it rested almost exclusively on the lady's own evidence; hence, I had little doubt that, upon cross-examination, the prisoner would be acquitted. The trial proceeded; I was then rather young at the bar, and determined, for my own sake, to make an interesting and affecting speech for my client; and having no doubt of K.'s acquittal, I certainly overcharged my statement, and added some *facts* solely from invention. My surprise, then, may be estimated, when I heard Miss B. swear positively to *every syllable* of my emblazonment. I should now have found myself most painfully circumstanced, but that I had no doubt she *must* be altogether discredited. In fact, she was quite shaken by the cross-examination of the prisoner's counsel. I left the court as the jury retired. In about an hour I received an account that K. had been found *guilty*, and sent back to gaol under sentence of death! I was thunderstruck, and without delay wrote to the chief secretary in Dublin, begging him instantly to represent to the Lord Lieutenant the real facts; execution was in consequence respited. I waited on the Lord Lieutenant, stated precisely the particulars I have here given, and my satisfaction (even from my own brief) that the girl was perjured." The end of it was, that the Lord Chancellor Clare recommended the sentence to be changed to transportation for life, and K. was accordingly so transported.*

There is a story, which, if true, would redound still more to the discredit of an individual barrister. It is

* Personal Sketches, by Sir Jonah Barrington, vol. i. p. 365, ed. 1827.

thus related,—"A fellow was tried for highway robbery and the prosecutor swore positively to him, saying he had seen his face distinctly, for it was a bright moonlight night. The counsel for the prisoner cross-questioned the man, so as to make him repeat that assertion, and insist upon it. He then affirmed that this was a most important circumstance, and a most fortunate one for the prisoner at the bar; because the night, on which the alleged robbery was said to have been committed, was one in which there had been no moon; it was during the dark quarter! In proof of this he handed an almanac to the bench,—and the prisoner was acquitted accordingly. The prosecutor, however, had stated every thing truly; and it was known afterward, that the almanac, with which the counsel came provided, had been prepared and printed for the occasion." *

This anecdote insinuates, or at any rate permits an inference, that the counsel was a party to the fraud. But in all likelihood the whole is a pure fiction, "a thing devised by the enemy," an enemy to the good fame of the bar. It is likely to be a fiction for these reasons: first, that the witness having once sworn positively to the moonlight, it is improbable counsel would by a second question hazard a less positive and favorable answer, reducing perhaps the moonlight to starlight, to light enough still to see and identify the prisoner by; and secondly, it is not to be supposed, that for a "fellow," a highway robber, any one would venture to practice, and brave the punishment of, such an extreme contempt of court, and profanation of justice. The result may be taken to be, that the fabricator, the original teller, of the anecdote, said "the thing which was not;" to use the polite expression of the Hou-

* The Doctor, vol. iii. p. 146, ed. 1835.

yhnhnms, who, we are told, have no word in their language to express lying or falsehood.*

It is a standing question, whether an advocate can with a safe conscience support a cause which "he knows to be bad."

The advocate represents his client. But he does not represent him in the sense, that for every purpose of attack and defense he stands entirely in his client's place. If he did, such representation would necessarily involve this consequence,—that, supposing the client himself would attack or defend in an unscrupulous, dishonorable, or lying manner, the advocate must do so too. Such a consequence completely extinguishes the notion of entire representation of the client.

Taking then a civil case, and supposing there be an issue or question of law to be determined by the court. If it be inquired, whether an advocate can conscientiously take up the side, which, in his opinion, is wrong, this inquiry may be met by the following considerations:—It may, it is presumed, be stated to be a principle, applicable to the present inquiry, that the court does not need to be instructed in the law of the particular case by the advocate on either side. Then with regard to the advocate's own opinion of the law, this opinion may be wrong; he ought not to assume it to be right; and the decision of the point does not depend on his opinion, but on that of the court. An advocate must not knowingly mis-cite any case or authority; but in laying before the court any principle, case, or authority, he is at liberty to submit to the court such purport or effect of it as he thinks will best sustain the interest of his client. He may even omit to bring to the notice of the court, any principle, case, or

* Gulliver's Voyage to the Houyhnhnms.

authority, which he considers is opposed to his client's interest; for on the principle that the court needs no instruction from the advocate, he may conclude that the court is in possession of it.

Taking another civil case, and supposing the issue to be, a question of fact to be determined by the jury; in this instance it is essential to justice that the witnesses give in evidence all the facts which, of their own knowledge, they are acquainted with. If then after an advocate has, in his examination of his own witness, brought out certain facts, which support his client's case, he is aware that the witness is also in possession of another fact, which if made known he thinks would hurt or endanger his own client, and in proportion assist his adversary; under these circumstances, the advocate must, it is imagined, find himself in this strait: —if he questions the witness on the particular fact, his answer may prejudice his client's cause; and if he omits to examine the witness upon it, then, to the extent of the concealed matter, the advocate risks making himself a conniver at injustice towards the other side; for he cannot be sure, either that the witness will, without any examination upon it, divulge the omitted fact, or that the opposite side will, on cross-examining the witness, elicit it out of him.

To notice next the case of a criminal prosecution. If it be inquired, whether an advocate can, with a safe conscience, plead for a prisoner, or other accused person, who, he believes, is guilty, the question suggests these observations:—The advocate's belief of the guilt may be formed from the circumstances disclosed in his instructions for the defense, or even from the express confession of the accused person to the advocate himself. On a criminal prosecution, one principle acted on by the English law is, that no one is bound to convict him-

self; another is, that the *onus probandi*, the burthen of proof of the offense charged, lies on the party prosecuting. These principles exempt the advocate of any one accused from all obligation to divulge, through his examination of the witnesses, any fact of which the advocate may happen to have knowledge, and which he thinks will be injurious to his client. The conscience of the advocate cannot be hurt except by a breach of his duty: he owes no duty to the public, nor to any one, to disclose the accused person's guilt; his whole duty is to his client; and this duty is, to take care that his client have justice.

Southey having taken occasion to observe, "There is but too much cause to conclude, that our moral sense is more easily blunted than our physical sensations," goes on to assert:—"The most upright lawyer acquires a sort of Swiss conscience * for professional use; he is soon taught that considerations of right and wrong have nothing to do with his brief, and that his business is to do the best he can for his client, however bad the case. If this went no farther than to save a criminal from punishment, it might be defensible on the ground of humanity, and of charitable hope. But to plead with the whole force of an artful mind, in furtherance of a vexatious and malicious suit,—and to resist a rightful claim with all the devices of legal subtlety, and all the technicalities of legal craft,—I know not how he, who considers this to be his duty toward his client, can reconcile it with his duty toward his neighbor." And after making an allusion to persons who "would resent any imputation upon their honor or their courage, as an offense not to be forgiven," Southey thus continues,—"It is difficult to understand, how even such persons

* As mercenary soldiers it is presumed is meant.

can undertake to plead the cause of a scoundrel in cases of seduction,—how they can think that the acceptance of a dirty fee is to justify them for cross-examining an injured and unhappy woman, with the cruel wantonness of unmanly insult, bruising the broken reed, and treating her as if she was as totally devoid of shame as they themselves of decency and humanity. That men should act thus, and be perfectly unconscious the while that they are acting a cowardly and rascally part, and that society should not punish them for it, by looking upon them as men who have lost their caste, would be surprising, if we did not too plainly see to what a degree the moral sense, not only of individuals, but of a whole community, may be corrupted." *

Southey has, it may be thought, with more zeal than judgment, animadverted on what he is pleased to call the "Swiss conscience" of a lawyer, in remarks which unnecessarily assail the Swiss nation, and are intended to stigmatize the English bar. This amiable man has here displayed his kindness of heart, but at the same time has betrayed his ignorance of these principles of advocacy, viz., not to prejudge a case; and, whether in attack or defense, to see justice done to one's own client. Through an abuse of an advocate's privileges by individuals, in particular instances, he has, without distinction of men, their minds, principles and characters, inconsiderately aspersed in an equal degree the whole bar. In the instance of seduction he mentions, he assumes that the advocate before the trial knows the defendant to be a scoundrel. But let this assumption not be made, then the rascality of the defendant is the very point of the trial, the point to be proved, and, until such proof, the defendant is in law innocent. The advocate,

* The Doctor, vol. ii. pp. 292, 293, ed. 1834.

on receiving his brief, is not to prejudge his client's case; his office is, to defend him; to see that the witnesses against him speak nothing but the truth. Persons accused of the greatest crimes;—a murderer, a traitor,—are entitled to this protection. Southey is right in saying, that the advocate is not justified in cross-examining a woman "with the cruel wantonness of unmanly insult;" and if such atrocity has in ruder times been practiced, and may still not be quite unknown, yet the modern more refined feelings and manners, generally diffused throughout society, hold out a promise of its early extinction.

The defense of a bad cause is the subject of the following observations by Sir John Davis, Attorney-General in Ireland in the reign of James I. Among other "vulgar imputations cast upon the law and lawyers," he particularizes this, — "That many bad and dishonest causes are wittingly defended by the professors of the law." And in answer to this objection he says, —"There is yet another exception against the professors of our law, namely, that wittingly and willingly they take upon them the *defense* of many *bad causes*, *knowing* the same to be unjust, when they are first consulted with and retained. And this is objected, by such as presume to censure our profession, in this manner. In every cause between party and party (say they) there is a *right*, and there is a *wrong*, yet neither the one party nor the other did ever want a counsellor to maintain his cause. This may be true for the most part, and yet in truth the learned counsel, whose fortune it is to light on the *wrong* side, may be free from imputation of any blame. For when doth the right or wrong in every cause appear? When is that distinguished and made manifest? Can it be discovered upon the first commencement of the suit, and before it be known

what can be alleged and proved by either party? Assuredly, it cannot; and, therefore, the counsellor, when he is first retained, cannot possibly judge of the cause, whether it be just or unjust, because he hears only one part of the matter; and that also he receives by information from his client, who doth ever put the case with the best advantage for himself. But when the parties have pleaded, and are at issue; when they have examined witnesses in course of equity, and be descended to a trial in course of law; after publication and hearing in the one cause, and full evidence delivered in the other; then the learned counsel of either side may, perhaps, discern the right from the wrong, and not before. But then are the causes come to their catastrophe, and the counsellors act their last part. And yet until then the true state of the cause on both sides could not possibly be discovered. *

The subject of an advocate's supporting a cause which "he knows to be bad," is thus treated by Dr. Johnson in a conversation between him and Boswell:—"I asked him whether, as a moralist, he did not think the practice of the law, in some degree, hurt the nice feeling of honesty. *Johnson.* Why, no, sir, if you act properly. You are not to deceive your clients with false representations of your opinion: you are not to tell lies to a judge. *Boswell.* But what do you think of supporting a cause which you know to be bad? *Johnson.* Sir, you do not know it to be good or bad, till the judge determines it. I have said that you are to state facts fairly; so that your thinking, or what you call knowing, a cause to be bad, must be from reasoning, must be from your supposing your arguments to be weak and inconclusive. But, sir, that is not enough. An argu-

* Preface to Sir John Davis' Reports.

ment which does not convince yourself may convince the judge, to whom you urge it: and if it does not convince him, why then, sir, you are wrong, and he is right. It is his business to judge; and you are not to be confident in your own opinion that a cause is bad, but to say all you can for your client, and then hear the judge's opinion."*

There is another point connected with this subject, the advocate's affecting warmth when he does not feel it, upon which Dr. Johnson, in continuation of the same conversation, has also expressed his opinion:—"*Boswell.* But, sir, does not affecting a warmth when you have no warmth, and appearing to be clearly of one opinion, when you are in reality of another opinion, does not such dissimulation impair one's honesty? Is there not some danger that a lawyer may put on the same mask in common life, in the intercourse with his friends? *Johnson.* Why, no, sir. Every body knows you are paid for affecting warmth for your client; and it is, therefore, properly no dissimulation: the moment you come from the bar you resume your usual behavior. Sir, a man will no more carry the artifice of the bar into the common intercourse of society, than a man, who is paid for tumbling upon his hands, will continue to tumble upon his hands, when he should walk on his feet."

The advocacy of a bad cause is a subject of further remarks by Dr. Johnson in a conversation which Boswell has recorded:—"We talked of the practice of the law. Sir William Forbes said, he thought an honest lawyer should never undertake a cause which he was satisfied was not a just one. Sir, said Johnson, a lawyer has no business with the justice or injustice of the cause which he undertakes, unless his client asks his

* Life of Johnson, by Boswell, vol. iii. p. 36, ed. 1835.

opinion, and then he is bound to give it honestly. The justice or injustice of the cause is to be decided by the judge. Consider, sir, what is the purpose of courts of justice? It is, that every man may have his cause fairly tried, by men appointed to try causes. A lawyer is not to tell what he knows to be a lie; he is not to produce what he knows to be a false deed; but he is not to usurp the province of the jury and of the judge, and determine what shall be the effect of evidence, what shall be the result of legal argument. As it rarely happens that a man is fit to plead his own cause, lawyers are a class of the community, who, by study and experience, have acquired the art and power of arranging evidence, and of applying to the points at issue what the law has settled. A lawyer is to do for his client all that his client might fairly do for himself, if he could. If by a superiority of attention, of knowledge, of skill, and a better method of communication, he has the advantage of his adversary, it is an advantage to which he is entitled. There must always be some advantage, on one side or other; and it is better that advantage should be had by talents than by chance. If lawyers were to undertake no causes till they were sure they were just, a man might be precluded altogether from a trial of his claim, though, were it judicially examined, it might be found a very just claim."*

It is interesting to read in the following relation, taken from Lord Eldon's Anecdote Book, the just opinion which his lordship, when Mr. Scott, a young man, had formed of the duty of counsel in conducting a cause, and the bold manner in which he ventured to lay it before a "leader," of whose practice in conducting a case he did not approve; and it is no less interesting to see

* Life of Johnson, by Boswell, vol. iv. p. 16, ed. 1835.

the gentleness of the man in full practice under the censure of a "junior," who had no business at all:—

"When I first went the Northern Circuit, I employed my time, having no business of my own, in attending to the manner in which the leading counsel did their business. I left Lancaster, at the end of a circuit, with my friend Jack Lee, at that period a leader upon the circuit. We supped and slept at Kirkby Lonsdale, or Kirkby Stephen. After supper I said to him, 'I have observed that throughout circuit, in all causes, in which you were concerned, good, bad, indifferent, whatever their nature was, you equally exerted yourself to the utmost to gain verdicts, stating evidence and quoting cases, as such statement and quotation should give you a chance of success, the evidence and the cases not being stated clearly, or quoted with a strict attention to accuracy, and to fair and just representation. Can that,' said I, 'Lee, be right? Can it be justified?'—'Oh, yes,' he said, 'undoubtedly. Dr. Johnson,' he stated, 'had said, that counsel were at liberty to state, as the parties themselves would state, what it was most for their interest to state.' After some interval, and when he had had his evening bowl of milk-punch and two or three pipes of tobacco, he suddenly said, 'Come, Master Scott, let us go to bed. I have been thinking upon the questions that you asked me, and I am not quite so sure that the conduct you represented will bring a man peace at the last.'

"I have understood that Dr. Johnson's statement was to this effect: that as it was the duty of counsel to give information to the court, he ought to state facts accurately, to quote cases accurately, to misrepresent nothing, with respect either to facts or cases; and having accurately stated facts and quoted cases, he was at liberty in conscience to reason upon them to the very

best of his powers and abilities; and as the law supposed the judge to be an abler man, and an abler lawyer, than the counsel, the judge was to reason better upon the facts and the cases than the counsel; and, proceeding in this way, the counsel did nothing wrong in thus gaining the cause for his client. But it may be questioned, whether even this can be supported."*

Coleridge has left us his opinion on the necessity for an order of advocates, and on their duties. It is thus expressed,—"There is undoubtedly a limit to the exertions of an advocate for his client. He has a right, it is his bounden duty, to do every thing which his client might honestly do, and to do it with all the effect, which any exercise of skill, talent, or knowledge of his own may be able to produce. But the advocate has no right, nor is it his duty, to do that for his client which his client *in foro conscientiæ* has no right to do for himself; as, for a gross example, to put in evidence a forged deed or will, knowing it to be so forged. As to mere confounding witnesses, by skillful cross-examination, I own I am not disposed to be very strict. The whole thing is perfectly well understood on all hands; and it is little more in general than a sort of cudgel-playing between the counsel and the witness; in which I think I have seen the witness have the best of it, as often as his assailant. It is of the utmost importance, in the administration of justice, that knowledge and intellectual power should be as far as possible equalized between the Crown and the prisoner, or plaintiff and defendant. Hence especially arises the necessity for an order of advocates,—men whose duty it ought to be, to know what the law allows and disallows; but whose interests

* Life of Lord Eldon, by Twiss, vol. i. p. 106, ed. 1844.

should be wholly indifferent as to the persons or characters of their clients."*

In England, as in ancient Rome, among the brightest ornaments of the "order" are men of humble birth.†

The oath which a jury takes is, to give a true verdict according to the evidence. From this it follows, that no comment, no insinuation, no argument by an advocate ought to be of any value with the jury, that does not arise out of the evidence, and is not justified by it.

The eloquence of the advocate may be addressed to the understanding of the jury, or to their feelings.

In the majority of instances the chief aim of the advocate is, to convince the understanding. To effect this there is a range of topics, and a method, of which almost all cases admit; viz., to introduce such general observations as are pertinent to the cause in hand; to point out the completeness of a chain of evidence, or the failure of a material link; to insist on the fullness of the evidence on his client's side, and the meagreness of it on his opponent's; to dilate on the credit or discredit of witnesses; to meet and take off the adversary's comments, insinuations, and arguments; and, without wasting effort on lesser matters, to seize on his own client's strong point, attract the jury to it, and by reiterated strokes to impress it deeply on the minds of the jury.‡

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* Coleridge's Table Talk, vol. ii. p. 4, ed. 1835. "On a souvent besoin d'un plus petit que soi."—*Fables de La Fontaine*, i. 11.

† Juvenal, viii. 47.

‡ ["Hume is an accomplished advocate without positively asserting much more than he can prove; he gives prominence to all the circumstances which support his case; he glides lightly over those which are unfavorable to it; his own witnesses are applauded and encouraged; the statements which seem to throw discredit on them are controverted; the contradictions into which they fall are explained away; a clear and connected ab-

We learn from a letter of Pliny the different ways in which he and another Roman conducted their clients' cases.*

It has been considered a defect in Lord Eldon, when at the bar, that he did not single out one strong point of his case, and mainly rest and insist upon that, but chose rather to rely on number, mingling strong and weak points together. "He was defective," says Lord Brougham, "in one of the great qualities of an advocate—a prompt and steady determination as to the course he should pursue, that which is called the *coup d'œil* in the field. His wish to leave nothing unnoticed being proportioned to the extreme anxiety of his disposition, he frequently overlaid his case at the bar, while the multitude of his points gave his adversaries the opportunity of entangling him in the mazes of his own web, and still oftener enabled them to defeat him

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stract of their evidence is given; every thing that is offered on the other side is scrutinized with the utmost severity; every suspicious circumstance is a ground for comment and invective; what cannot be denied, is extenuated or passed by without notice; concessions even are sometimes made; but this insidious candor only increases the effect of the vast mass of sophistry."—*Macaulay, Essay on History.*]

* "I remember when Regulus and I were concerned together in a cause, he said to me, 'You seem to think it necessary to dwell upon every single circumstance; whereas I always take aim at once at my adversary's throat, and there I closely press him.' ('Tis true, he tenaciously holds whatever part he has once fixed upon; but the misfortune is, he is extremely apt to mistake the right place.) I answered, it might possibly happen, that what he called the throat was, in reality, some less vital part. As for myself, said I, who do not pretend to direct my aim with so much certainty, I attack every part, and push at every opening; in short, to use a vulgar proverb, I leave no stone unturned. As in agriculture, it is not my vineyards, or my woods alone, but my fields also that I cultivate; and (to pursue the allusion) as I do not content myself with sowing those fields with only one kind of grain, but employ several different sorts; so, in my pleadings at the bar, I scatter various arguments like so many kinds of seed, in order to reap from thence whatever may happen to succeed; for the disposition of your judges is as precarious, and as little to be ascertained, as that of soils and seasons."—Melmoth. *Plin. Epist.* i. 20.

on some immaterial ground, where he was weak, though other stronger and impregnable positions were his, had he never ventured out of them to fight at a disadvantage. Where a single and a learned judge alone is to deal with a case, this will seldom mislead him, but before a jury its defects must have been extremely prejudicial. Accordingly his greatest failures were in such proceedings." *

An advocate's success with a jury may be hoped for, if he can by any means gather their own view of a point. To keep that view before them, and encourage it, cannot fail to do good service.†

On the force which an advocate's *arguments* ought to have, the opinion of Dr. Johnson is thus recorded: "Sir James Johnson happened to say, that he paid no regard to the arguments of counsel at the bar of the House of Commons, because they were paid for speaking. *Johnson.* Nay, sir, argument is argument. You cannot help paying regard to their arguments, if they are good. If it were testimony, you might disregard it, if you knew that it was purchased. There is a beautiful image in Boyle upon this subject: testimony is like an arrow shot from a long bow; the force of it depends on the strength of the hand that draws it. Argument is like an arrow from a cross-bow, which has equal force though shot by a child." ‡ The exact words of Boyle appear to be these: "Testimony is

* Lord Brougham's Historical Sketches of Statesmen, 2d series, p. 66, ed. 1839.

† "As every man naturally favors his own discoveries, when he hears an argument urged, which had before occurred to himself, he will certainly embrace it as extremely convincing. The orator, therefore, should so adapt himself to his audience, as to throw out something, which every one of them, in turn, may receive and approve as conformable to his own particular sentiments."—Melmoth. *Plin. Epist.* i. 20.

‡ Life of Johnson, by Boswell, vol. viii. p. 281, ed. 1835.

like the shot of a long bow, which owes its efficacy to the force of the shooter; argument is like the shot of the cross-bow, equally forcible whether discharged by a giant or a dwarf." *

Agreeably to what Boyle and Johnson say, the argument of a "young counsel" may prevail over that of one older and more experienced. In Pepys' Diary is found this note: "23d April, 1669. To the council chamber, and heard two or three cases; among others, that of the complaint of Sir Philip Howard and Watson, the inventors, as they pretend, of the business of varnishing and lackerworke, against the Company of Painters, who take upon them to do the same thing; where I saw a great instance of the weakness of a young counsel, not used to such an audience, against the Solicitor-General and two more able counsel, used to it. Though he had the right of his side, and did prevail for what he pretended to against the rest, yet it was with much disadvantage and hazard." †

As in the case mentioned by Pepys, a "young counsel" may often be equal to the occasion, and prevail; yet sometimes the strong massive structure of merits and argument may require the strength and skill of a "Solicitor-General" to subvert it.‡

When the feelings of a jury are appealed to, then supposing the advocate to be really moved by the situation of his client, moved to anger, pity, thirst for redress for wrongs inflicted by, it may be fraud, treachery, cruelty; if the advocate shows his emotion and

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* Johnson's Dict. *v.* Cross bow. † Pepys' Diary, vol. iv. p. 158, 6th ed.

‡ Few words suffice to win a cause that's plain;
A structure loose, what force can it withstand?
Strongholds and firm-knit walls great strength must gain,
Although defended by a slothful band.
Ovid, Trist. Lib. iii. *El.* xi. 21.

sympathy by his words, countenance, and demeanor, extending even to the shedding of tears, this manifestation of feeling will powerfully tell with the jury, if the evidence on the trial warrants the appeal, if the bare tale told by the witnesses works on the jury's feelings. But if this naked tale fail to move the jury, they may suspect the advocate's emotion to be put on; it may pass in their minds,—"Eloquence takes either side:"

> "Does justice, or the client's sense,
> Teach lawyers either side's defense?
> The fee gives eloquence its spirit;
> That only is the client's merit." *

This, in truth, is a weak point in hired advocacy; the fee begets a suspicion of simulated concern and emotion.

Tears are indicative of a soft heart.†

But it is Cicero's advice, that, when the jury are touched, the advocate's tears should cease; and this he thinks, on good authority, they easily can.‡

For the purpose of justice, a jury should possess a proper fear of the advocate's power of eloquence; a power of opposite tendencies,—able to lead aright, but also to mislead; having power to dazzle, fascinate, "to make the worse appear the better reason;"

> "With magic dust their eyne he tries to blind." §

It is not, however, often that it is needful, or in place, to exhort a jury to beware of this baneful influence of eloquence. On a trial, it is commonly the

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* Gay's Fables, part ii. 9. † Juvenal, xv. 131.

‡ So soon as their hearts are touched, it will not be advisable to continue weeping; and, as Appolonius has said, nothing dries up sooner than a tear.—*De Inventione*, i. 56.

§ Thomson's Castle of Indolence, canto ii. st. 41.

evidence that alone governs the verdict. A trial resembles a contest, in which the witnesses are the combatants. These on the one side are pitched against those on the other; and the opposed advocates range and fight them, the one set against the other. The end of it is,—"Look here upon this picture, and on this;" each advocate claiming pre-eminence for the evidence on his own side.

Evidence is eloquence. It is usually, as it ought to be, the most powerful kind of eloquence to persuade a jury. It was probably so in the grand and memorable defense of Hardy, on his trial for high treason in 1794.* Hardy was indicted on that branch of the statute of Edward III. which makes it treason to conspire to depose the king and put him to death. Erskine and Gibbs, the counsel for Hardy, rested his defense chiefly on the evidence, that the intention of Hardy and the persons indicted with him, was, not to depose the king and put him to death, but to procure a reform in the House of Commons, according to the plan of the Duke of Richmond contained in a letter which he had written to Lieutenant-Colonel Sharman. To prove to the jury that this was Hardy's only intention was the steadily-continued aim of Erskine and Gibbs, in their cross-examination of the witnesses for the Crown, in their examination of the witnesses for the defense, and in their addresses to the jury; this intention to procure reform they used as a wedge to drive out the intention in the indictment to depose the king and to put him to death.

Of the two speeches of Erskine and Gibbs to the jury, it is probable that, so far as pleasure is excited in an audience by the delivery of an address by a speaker copious in words, of fruitful imagination, and ardent and graceful in manner, the jury listened to the speech

* See the Trial, taken by Gurney, ed. 1795.

of Erskine with greater pleasure than they did to that of Gibbs. The dryness and heaviness of legal topics, necessarily introduced into Erskine's speech, as the statute of Edward III., and the cases and authorities upon the construction of it, must have been much relieved, and the strain on the minds of the jury, by long close legal arguments upon these topics, must have been most beneficially eased, by Erskine's occasional excursions into topics of a lighter character; topics more readily understood and supplying much refreshment to the mind; he every now and then diverging into matter, which, as he said, "obtruded itself upon his mind from common reading," and entering upon digressions in which, to use his own words, "he must express himself as the current of his mind would carry him." Buoyancy and life were poured into his address, by his glance at and reprobation of the impeachment of Warren Hastings, by his quotations from Thomson and Burke and Johnson, by his eulogies of the characters and writings of these distinguished men, by his feeling mention of Burke, then "bending beneath the pressure of a domestic misfortune," and by his touching allusion to the recent death of the wife of Hardy, who if convicted must return no more to his family—"Alas, gentlemen, what do I say, he has no family to return to; the affectionate partner of his life has already fallen a victim to the surprise and horror which attended the scene now transacting." And in putting an imaginary possible case, that a conspiracy to effect a reform in the House of Commons, by pamphlets and speeches, might end in the death of the king; as in this way,—"which pamphlets and speeches might produce universal suffrage, which universal suffrage might eat out and destroy aristocracy, which destruction might lead to the fall of monarchy, and, in

the end, to the death of the king," he was led to remind the jury of the nursery story, "The House that Jack Built:"—"Gentlemen, if the cause were not too serious, I should liken it to the play with which we amuse our children—This is the cow with the crumpled horn, which gored the dog, that worried the cat, that eat the rat, &c., ending in the house which Jack built."

Nevertheless, evidence may with a jury carry greater weight, and be more persuasive, than the most fluent and polished address of an advocate. And, so far as evidence is an aid to an appeal to a jury, Gibbs had this advantage over Erskine, that, since the address of the latter, the jury had had before them the witnesses for the defense, whose testimony brought in a vast accession of weight to the argument, that the design of Hardy and his associates was, not to depose and put to death the king, but, taking as their guide the plan of the Duke of Richmond for reform, was merely to cause a reform in the House of Commons. This argument stored with its accumulated weight Gibbs presented to, and kept before, the jury in a light so clear, that the strength of it could not escape their notice and assent. The ample passages which Gibbs read from the Duke's letter on reform, the presence of the Duke himself in court, a witness producing and avowing to the jury his own letter, and the supposed speech (a happy supposition), which Gibbs, in his address to the jury, put into the mouth of the Duke, as an advocate for Hardy, —these circumstances could not fail to make evidence eloquent, and they probably contributed more than any thing else to cause the jury, sworn to give a true verdict according to the evidence, to give the verdict, which they did, of not guilty.

Bishop Sanderson, in a sermon preached by him at the Assizes at Lincoln, in 1630, after noticing certain

impediments, that stand in the way of justice, goes on to say,—"Add hereunto the great advantage or disadvantage, that may be given to a cause in the pleading, by the artificial insinuations of a powerful orator. That same πειθὼ and *Suadæ medulla*, as some of the old heathens * termed it, that winning and persuasive faculty, which dwelleth in the tongues of some men, whereby they are able, not only to work strongly upon the affections of men, but to arrest their judgments also, and to incline them whether way they please, is an excellent endowment of nature, or rather (to speak more properly) an excellent gift of God. Which whosoever hath received is by so much the more bound to be truly thankful to him that gave it, and to do him the best service he can with it, by how much he is enabled thereby to gain more glory to God, and to do more good to human society than most of his brethren are. And the good blessing of God be upon the heads of all those, be they few or many, that use their eloquence aright, and employ their talent in that kind for the advancement of justice, the quelling of oppression, the repressing and discountenancing of insolency, and the encouraging and protecting of innocency. But what shall I say then of those, be they many or few, that abuse the gracefulness of their elocution (good speakers, but to ill purposes), to enchant the ears of an easy magistrate with the charms of a fluent tongue, or to cast a mist before the eyes of a weak jury, as jugglers make sport with country people; to make white seem black, or black seem white; so setting a fair varnish upon a rotten post, and a smooth gloss upon a coarse cloth; as Protagoras sometimes boasted, that he could make a bad cause good, when he listed? By which

* See Cic. Brutus, 15.

means judgment is perverted, the hands of violence and robbery strengthened, the edge of the sword of justice abated, great offenders acquitted, gracious and virtuous men molested and injured. I know not what fitter reward to wish them for their pernicious eloquence, as their best deserved fee, than to remit them over to what David hath assigned them in Psalm cxx., —'What reward shall be given or done unto thee, O thou false tongue? Even mighty and sharp arrows, with hot burning coals.'"

Lord Brougham speaking of a class of men, whom he calls "able," but who, it may be collected, are in his estimation "inferior" to Lord Mansfield, Lord Erskine, and Sir Samuel Romilly, and of which able, though inferior, class he says Sir Vicary Gibbs was a "perfect sample," gives the following general sketch of their professional character: "The professional character of the men, whom we are discussing, is generally pure and lofty; the order to which they belong is sacred in their eyes; its fame, its dignity, even to its etiquette, must all be kept unsullied; and whatever may be their prejudices and their habits, political or professional, how great soever their difference to power, how profound their veneration for the bench, how deep-rooted their attachment to existing institutions, how fierce their hostility to all innovations, how grave or how scornful their frown upon the multitude at large; yet is their courage undaunted in defending whatever client may intrust his suit to their patronage, be he a rabble-leader or a treason-monger, a libeller or a blasphemer; and in discharging toward him the high duties of their representative character, they so little regard either the resentment of the government or the anger of the court

* Sanderson's Sermons, vol. i. p. 273, ed. 1681.

that they hardly are conscious of any effort in sacrificing every personal consideration to the performance of their representative, and, because it is representative, their eminently important office."*

Admitting that Sir V. Gibbs, and all the other "able," but "inferior," men, his contemporaries, "attained not unto the first three," Lord Mansfield, Lord Erskine, and Sir S. Romilly, and admitting that neither do the modern men of the same class attain unto their excellence, yet advocates of every rank have all in common this, the chief, duty of an advocate,—to see that justice be done to his client; and consistent with this duty is, his entire freedom from all desire that injustice befall his client's adversary. An unrighteous, vexatious, or ungracious claim, or defense, may merit to be discountenanced, and baffled, and, according to circumstances, scouted or laughed out of court. But before the claim or defense is proved to be of this, or the like, hateful nature, it is no part of an advocate's duty to make himself a possible instrument of injustice to the adverse side, by endeavoring to defeat it, not by evidence or fair argument, but by perplexing, stupifying or ridiculing its honest witnesses, or by indulging in jests, raillery, or sarcasm, against the adverse suitor himself.†

For the purpose of pleading, an advocate lays aside for the time his own individuality, and takes on him a peculiar character,—a part personating his client; yet not entirely, for this might make him speak with a false tongue, but partially, and to the extent alone to see that his client have justice. So considered, an advo-

* Historical Sketches of Statesmen, First Series, pp. 124, 127, 128, ed. 1839. And see Hor., De Art. Poet. 367.

† He who runs in a race may fairly run as fast as he can; but he is not justified in tripping up his competitor, or pushing him down.—*Cic. Off.* iii. 10.

cate in his own person gains no honor by pleading for the just, nor suffers dishonor by pleading for the unjust: he is neither exalted if his client be of "the honorable of the earth," nor debased if he be of the offscouring of it. And such is the nature and chance of forensic warfare, so much does it incline to opposition and contrast, that the advocate, who is now pleading for the just, may on the very next trial plead for the unjust: he who has now closed his brief for a defendant, whose victory gives joy to a crowded court, may next represent a defendant, whose defeat the same audience, with an opposite joy, exult in.

An advocate, as the representative of his client and his organ of speech, can, so far as the law would permit his client to do, advance and maintain any religious, political, or other theory, tenet, or doctrine of his client, however unreasonable, absurd, or fanciful, it may be. And in doing this, if the advocate says what he himself does not think, what his own judgment does not approve of, or perhaps condemns, he will, secretly at least, wish it to be understood at the time, that he is not uttering his own opinions, but only those of his client; and, the cause being ended, he will be at full liberty to repudiate for himself personally any part, or the whole, of what he has said professionally only for his client; and, in such a case, to object afterwards against the advocate, that the language he used exhibits his own personal principles, views, or sentiments, would be simply folly. This distinction between the professional and personal character of an advocate is draw by Cicero.*

* Any one makes a great mistake who thinks that he finds in my forensic speeches my own deliberately-recorded opinions. For all speeches of that kind take their form and color from the character of the suits and times in which they are delivered. They must not be understood to exhibit the opinions of the advocates personally. For if causes could speak

To suppose that an advocate necessarily himself entertains all the opinions he expresses for his client would be about as reasonable as to impute to an author the morals of a character in his poem, novel, or play. Ovid, on the part of the authors, has strongly protested against such an imputation.*

In concluding this chapter, a word may be said on certain tendencies, which the constant exercise of the professional duties of an advocate is apt to encourage or occasion in him. This exercise of his duties is a species of education. And as the bringing up of a person may incline him to this or that particular opinion, or this or that particular study or pursuit, so the education, which the advocate in the exercise of his duties receives, may encourage or occasion in him certain tendencies peculiar to his profession.

Archbishop Whately having made the observations on the cross-examination of a witness, which have been transcribed in the last chapter, goes on to say,—"I will add one remark upon the danger incurred by the advocate—even if he be one who would scruple either willfully to use sophistry to mislead a judge, or to perplex and browbeat an honest witness—of having his mind alienated from the investigation of truth. Bishop Butler observes, and laments (preface to his sermons), that it is very common for men to have 'a curiosity to know what is *said*, but no curiosity to know what is *true*.' Now, none can be (other points being equal) more in need of being put on his guard against this fault than he who is professionally occupied with a multitude of cases, in each of which he is to consider what may be

for themselves, no one would employ an advocate; but as it is, we are retained to say, not what we ourselves may think, but what the cause in hand may inspire and dictate.—*Cic. Pro Cluentio*, 50.

* Trist. Lib. ii. El. i. 353.

plausibly urged on both sides; while the question *what ought* to be the decision is out of his province as a pleader. I am supposing him not to be seeking to mislead by urging *fallacious* arguments; but there will often be sound and valid arguments—real probabilities—on opposite sides. A judge, or any one whose business it is to ascertain truth, is to decide according to the *preponderance* of the reasons; but the pleader's business is merely to set forth as forcibly as possible those on his own side. And if he thinks that the habitual practice of this has no tendency to generate in him, morally, any indifference, or, intellectually, any incompetency, in respect to the ascertainment of truth, —if he consider himself quite safe from any such danger,—I should then say that he is in very great danger."*

If it be true that the pleader's business is, merely to set forth as forcibly as possible the reasons on his own side, the habitual practice of this kind of advocacy may be followed by the danger just mentioned. It is very certain that in many cases, where a question of fact, as distinguished from law, is raised, an advocate has no other source of learning the truth of the matter in dispute than his client's instructions, partial, it may be assumed, to his own side. And in a case of this sort it is not in the power of the advocate before the trial to view the circumstances on both sides, and to search among them for the truth. But even on a question of fact, his power may not always be so limited. And on a question of law, a pleader cannot set forth as forcibly as possible the reasons on his own side, without first having considered the reasons on the other side. If his

* Bacon's Essays, with Annotations by Archbp. Whately, p. 496, ed. 1856.

adversary's reason be strong, his own argument will not be as forcible as possible, unless it reduces, or at least attempts to reduce, the strength of his opponent's; and if his adversary's reasons be weak, his own argument will not be as forcible as possible, unless he makes his opponent's weakness a part of his own own strength. If this be so, it follows that it is the duty of an advocate to consider, on a question of law, the reasons on both sides of the case; and in the process of this consideration it may easily happen, either that the naturally inquiring mind of the pleader will lead him to look for the truth, or that, without such inquiring mind, the truth will flash upon him, although he make no search for it. If this view of the subject be correct, a consequence of it appears to be, that, on a question of law, it is not the pleader's business, merely to set forth as forcibly as possible the reasons on his own side; but that his duty is, to search into the reasons on both sides, and, having done this, then to set forth as forcibly as possible those on his own side.

It may further be remarked, that an advocate is in less danger of having his mind "alienated from the investigation of truth" from the circumstance, that before a person commences a suit, in which the question will be one of law, he usually, by laying a case before counsel, consults him on the prospect of success; and a consultation of this kind commonly precedes the defense of a suit. So that in this way, whether the suit be begun, or defended, or not, the advocate has both an opportunity, and an obligation, to investigate truth. For to give an opinion, that, so far as circumstances will permit, may be a safe guide to the plaintiff or defendant seeking advice, the advocate is obliged to investigate the authorities on both sides, and by weighing

them to learn what, in his judgment, is the result, or in other words the truth.*

* It appears that Lord Kenyon and Lord Eldon, when at the bar, differed very much in the attention they paid to cases: Mr. Kenyon professedly bestowed little labor upon them; while Mr. Scott felt they cast upon him a responsibility that demanded much care and trouble in giving his opinion. This is shown in the following extract from Lord Eldon's Anecdote Book:—"When I got into considerable business at the Bar, I was much resorted to by professional persons, laying cases before me for my opinions. Lord Kenyon, when at the Bar, made, one year (of which he showed me evidence), by opinions only, about three thousand pounds—at that time, according to the rate of fees given to counsel, a very large sum: It was, however, his rule to consider himself as only required to read the case, as it was stated to him, and to give such opinion as his general knowledge enabled him to give upon reading it, without looking for further information as to matter of law, by looking into books. When he afterwards became a Judge in Equity, the rule by which he governed himself, as to the facts of any case, was to consider himself as not bound to seek for further information, as to those facts, than as the diligence of counsel had stated them; and his judgment was usually given, without assisting himself by more than his general knowledge of law enabled him to aid himself, at the conclusion of the counsel's reply. It is due to the very great law-learning of Mr. Kenyon, afterwards Lord Kenyon, to record, that no lawyer, in my days, could, in this way of proceeding, do so much justice to parties consulting him, or before him for judgment, as he could. My business as to giving opinions was of very short duration. I could not so far trust my knowledge of law, as to believe that I could not confirm it, or improve it, by looking into books and authorities after I had read the stated case. This led necessarily to delay, and sometimes to a correction of that opinion which I at first entertained, and which the solicitor consulting me wished to obtain perhaps. He then ceased, as to such matters, to be a client of mine. But this sort of employment forsook me in a greater degree, because, after my experience had taught me that cases upon which opinions had been given (and upon the encouragement contained in those opinions, suits had been instituted) differed materially and essentially in circumstances from what were proved to be the real cases, when the causes in such suits were heard, and that experience convinced me that a great many attorneys, who had stated cases, could not but know, that those were material and essential circumstances, which, being within their knowledge ought to have been, but which were not, stated in the cases when laid before counsel, I got into a habit prejudicial to myself, which I know in some instances to have been very useful to others, of considering the probability or improbability of the correctness and sufficiency of the statement in cases laid before me; stating in my opinions the vast difference it

A tendency to suspend his judgment on hearing one side only of a case can scarcely fail to be a result of an advocate's practice. On any question, in any transaction of life, in which there may be opposite sides, he, having heard one side only, is sure to inquire what can be said on the other: it instantly occurs to him to say, *audi alteram partem.* This fruit of his study and practice is truly valuable. A hasty conclusion on hearing one side only is, in every-day life, frequently an occasion of much misconception of things really said or done, of coolness or heat between friends, of injurious acts, and even of irremediable injustice.

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would make in the judgment if a suit were instituted, if facts were either suppressed or matters stated which were not facts, or if facts, so far as the statement went, were not the whole truth of the case; and then pointing out in the opinion what I thought possible, or conjectured, to be matters, which might form part of the case, though not at all stated, and circumstances which might qualify the effect of the facts, which might be only partially stated; leaving it to the party consulting me to make any representation as to such things as he might think proper; or to act upon an opinion which had all such qualifications in the body of it. Among solicitors and attorneys there were many very worthy men; there were others certainly not such; as there are in all other classes of men, good and bad. One of the worthiest I have known said, they did not want opinions that had so many 'ifs' in them; that such would not do for them; that they spoilt business; and certainly they, aided by a disinclination which I had to be engaged in a branch of the profession of so much responsibility, and with reference to which I thought so much care and trouble absolutely necessary, entirely spoilt my opinion business."—*Life of Lord Eldon, by Twiss*, vol. i. p. 136, ed. 1844.

CHAPTER XIII.

OF CONCLUSION FROM FACTS.

The purpose of an inquiry into facts before a jury is, to draw a conclusion from them,—an answer to the particular question they raise.

In the majority of cases the evidence of witnesses consists of ordinary matters of fact, common things which persons have said or done, which the witnesses have heard or seen, and which a jury have little or no trouble in making themselves masters of. But other cases present very considerable difficulties; cases, for example, into which there enter the principles and practice of a particular science or art, and the understanding of which by the jury is indispensable to a right verdict. Civil cases of this kind are causes relating to manufactures and patents. And, on criminal trials, frequently much of the evidence, and the most important part of it, consists of professional testimony of physicians, surgeons, and chemists. And in both the civil and criminal cases, a great part of the evidence is necessarily, and, if not necessarily, is often naturally, and as most convenient to the witnesses, given by them in scientific and technical language.

It may sometimes happen that part of the jury bring to the trial a knowledge, sufficient for their purpose, of the science or art introduced into the evidence. But as a jury are men taken from the public, without any regard to the kind of evidence, the scientific or technical testimony, they will hear, it generally perhaps happens that all the jury have during the trial to be

taught by the witnesses, in their evidence, so much scientific and technical knowledge as the jury require to arrive at a proper verdict in the case.

The positive, uncontradicted, opinion of a witness learned in a particular science, art, or other branch of knowledge, the jury may, without hesitation, rely on, and make their own, for the purpose of their verdict; and this, although at the time they do not understand, and have not the means of inquiring into, the principles or grounds of the opinion they hear. This faith in, and adoption of, other men's opinion is no more than is found in other affairs and actions of our lives. On this point we may take instruction from Locke and Hooker. "A man," says Locke, "who never took the pains to observe the demonstration, hearing a mathematician, a man of credit, affirm the three angles of a triangle to be equal to two right ones, assents to it, *i. e.*, receives it for true. In which case the foundation of his assent is, the probability of the thing, the proof being such as for the most part carries truth with it; the man, on whose testimony he receives it, not being wont to affirm any thing contrary to, or besides, his knowledge, especially in matters of this kind." *

"If," observes Hooker, "it be admitted, that, in matter of fact, there is some credit to be given to the testimony of man, but not in matter of opinion and judgment, we see the contrary both acknowledged, and universally practiced also, throughout the world. The sentences of wise and expert men were never but highly esteemed. Let the title of a man's right be called in question, are we not bold to rely and build upon the judgment of such as are famous for their skill in the laws of this land? In matter of state, the weight

* Locke on Human Understanding, book vi. ch. xv.

many times of some one man's authority is thought reason sufficient even to sway over whole nations. And this is not only with the simple sort; but the learneder and wiser we are, the more such arguments in such cases prevail with us. The reason why the simpler sort are moved with authority is, the conscience of their own ignorance; whereby it cometh to pass, that having learned men in admiration, they rather fear to dislike them than know wherefore they should allow and follow their judgments. Contrariwise with them that are skillful, authority is much more strong and forcible; because they only are able to discern how just cause there is why to some men's authority so much should be attributed. For which cause the name of Hippocrates, no doubt, was more effectual to persuade even such men as Galen himself than to move a silly empiric; so that the very selfsame argument in this kind, which doth but induce the vulgar sort to like, may constrain the wiser to yield. And therefore not orators only with the people, but even the very profoundest disputers in all faculties, have thereby often with the best learned prevailed most." *

In preparing for their verdict on the facts detailed in evidence, a main object of a jury will be to set these facts in such an order and light as will give them the best view of them, and so facilitate their decision upon them. As every thing depends on their belief of the witnesses, they will probably begin by considering the credit due to them, giving to every one the credit which they think he is entitled to, and refusing to give any credit to others whom they find to be unworthy of belief. Another step will be to weigh directly contradictory testimonies, keeping the one which they

* Hooker's Ecclesiastical Polity, book ii. s. 7.

think preponderates, and discarding the other. Opposing testimonies, which admit of reconciliation, they will reconcile accordingly. By a sifting process they will dismiss from their minds all the immaterial facts. In the case of two or more defendants affected by different evidence, the jury will make the necessary separation and adjustment of the evidence. By these and the like means, according to the circumstances of each case, the jury will have drawn into a comparatively small compass all the facts they need now at all look at. In this state of things the witnesses' parts are over; they have left the scene; and the facts which the jury have now to attend to stand by their own strength; such as they are, there they are; and the jury have not now to consider how they came by them.

These facts ranged in their proper places, as time and other incidents require, form a story. Often there is *direct* evidence of every part of the story; to complete the tale there is not wanting *direct* evidence of any fact.

In other cases, the facts proved by *direct* evidence form an incomplete story; the chain of facts composing it is imperfect; to complete the chain there is wanting evidence of some link in it. In a case of this sort, the missing fact can sometimes be supplied by the facts proved by the *direct* evidence; from these facts the one missing can be *inferred.* The circumstances proved by the *direct* evidence supply the *inference;* they are thus themselves evidence, although not direct, of the fact wanting; and they, united with the inference, constitute what is, and is called, *circumstantial* evidence. To draw the inference is the province of the jury.

When from acts proved by *direct* evidence against a prisoner a jury *infer* his *intention* in doing them, the

direct evidence, together with the inference, from *circumstantial* evidence against him.

Intention, in the sense of design, purpose, with which an act is done, is a common subject of inquiry by a jury. Intention is a mental fact; it exists in the mind of the man who conceives it.* It is in his power to conceal it from all other men. If he does nothing by word nor act to disclose it, no one else can penetrate to it, no other person need imagine its existence. But the man himself, in whose mind it exists, can and often does disclose it to others purposely and expressly by his words, oral or in writing. And besides, through some act of his, undesignedly on his part, his intention may be revealed. If from his intention as their source he does certain acts, from them other persons may, contrary to the man's will and expectation, infer the intention from which his acts proceeded.

The following questions of intention have been left to a jury:—

1. The intention of a person who hired a horse, as he said, to go to a particular place, but who on the same day sold the horse;—whether he meant, at the time of the hiring, to take such journey, but was afterwards tempted to sell the horse? or whether, at the time of the hiring, he had no intention to take the journey, but meant to sell the horse?†

2. The Riot Act, 1 George I., c. 5, provides, that if any persons unlawfully and riotously assembled shall unlawfully demolish or pull down, or begin to demolish or pull down, any dwelling-house, then the persons injured shall be entitled to damages, to be recovered as in the Act mentioned. In an action on this statute it appeared at the trial, that, during a time of scarcity,

* See *ante* page 9, note.

† Pear's Case, 1 Leach, 253. Charlewood's Case, *ib.* 456.

upwards of a hundred persons, assembled together, came to the house of the plaintiff, who was a baker, and asked if he had any flour; and being answered in the affirmative, they said they would have it at 2*s.* a stone (it being then worth about 5*s.*). The plaintiff said he could not afford it at that price; but they insisted on having it; and he, not able to resist, began to measure it out in small quantities. The rioters then began to break the windows of the bakehouse, and the dwelling-house adjoining, and broke the glass of three windows, and also the shutters. They took about ten stone out of the bakehouse, which was sold at the price named by themselves. The judge told the jury, if they were satisfied that the mob, who broke the glasses of the windows, and the shutters, meant to stop there and proceed no further, it might be too much to say that it was a beginning to demolish, &c. within the statute; but if they thought that the mob came with an intention to proceed to further acts of demolition, if they could not otherwise effect their purpose, then it was a beginning to demolish, &c. within the meaning of the Act, and consequently that the plaintiff was entitled to recover. The jury found for the plaintiff to the amount of all the damage proved.*

When a robbery or murder is committed, there is usually *direct* evidence of many circumstances which attended the commission of the crime; but to bring the guilt home to, to fix it on, a particular person as the perpetrator of it, the *direct* evidence often fails; in the chain of testimony this link is wanting; and then sometimes the *direct* testimony is strong enough, and at other times too weak, to justify an *inference* from it that the person on trial for the crime is guilty of it.†

* Burrows *v.* Wright, 1 East, 615.

† If a man is run through with a sword, and you, always a violent man,

It is clear that often "imputation and strong circumstances lead directly to the door of truth;"* and circumstantial evidence is by many thought more satisfactory and conclusive than evidence which is wholly direct. This is nowhere, perhaps, better expressed than in the following words of the Chief Justice on the trial in Dublin in 1823 of Forbes, and others, for a conspiracy and riot: "I am warranted in saying, that circumstantial evidence is frequently considered more unerring and satisfactory than direct proof, which may be the result of misrepresentation and perjury. If a man be murdered, but no one sees by whom, or how, there can be no direct evidence of the fact: but if another person, who has been known to have borne an ancient grudge against the deceased, and has been heard to make sanguinary and vindictive declarations against him, be found near the bleeding corpse with a deadly instrument covered with blood; this, though not direct evidence of his guilt, would yet, if unexplained, form a mass of circumstantial evidence which it would be next to impossible for the human mind to resist. Again, in the more common case of robbery, it most frequently occurs, that there is no direct proof of the commission of the crime [by a particular person]. But if the stolen goods be found, instantly after the robbery, in the immediate neighborhood of the place where the crime was committed, upon a person who can give no satisfactory account of them, it furnishes evidence most powerful and satisfactory of his having committed the offense."†

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at enmity with him, and holding a sword that is bloody, are the only person seen on the spot, and there is no reason to suspect any one else, how can I doubt of your guilt?—*Cic. De Orat.* ii. 40.

* Othello, A. iii. S. 3. † Greene's Report of the Trial, p. 350.

The result of circumstantial evidence can be but probability, not certainty; as probability of guilt, not certainty of it. And probability of guilt arising from circumstantial evidence may ultimately, and too late to save innocence, be discovered to have been ill-founded.

One instance of this kind, which occurred in the the reign of James I., is thus mentioned by Sir E. Coke: "In the county of Warwick there were two brethren, the one having a daughter, and, being seized of lands in fee, devised the government of his daughter, and his lands, until she came to her age of 16 years, to his brother. The uncle brought up his niece very well, both at her book and needle, &c.; and she was about 8 or 9 years of age; her uncle for some offense correcting her, she was heard to say, 'Oh, good uncle, kill me not.' After which time, the child after much inquiry could not be heard of. Whereupon the uncle being suspected of the murder of her, the rather for that he was her next heir, was committed to gaol upon suspicion of the murder, and was admonished by the Justices of Assize to find out the child, and thereupon they bailed him until the next assizes. Against which time, for that he could not find her, and fearing what would fall out against him, he took another child, as like unto her both in person and years as he could find, and apparelled her like unto the true child, and brought her to the next assizes; but upon view and examination she was found not to be the true child; and upon these presumptions, he was indicted and found guilty, and was hanged. But the truth of the case was, that the child being beaten over night, the next morning, when she should go to school, ran away into the next county, and was received and entertained of a stranger; and when she was 16 years old, at what time she could

come to her land, she came to demand it, and was directly proved to be the true child."*

Another instance is thus noticed by Sir M. Hale: "If a horse be stolen from A., and the same day B. be found upon him, it is a strong presumption that B. stole him; yet I do remember, before a very learned and wary judge, in such an instance B. was condemned and executed at Oxford Assizes; and yet within two assizes after, C., being apprehended for another robbery and convicted, upon his judgment and execution confessed he was the man that stole the horse, and, being closely pursued, desired B., a stranger, to walk his horse for him while he turned aside upon a necessary occasion, and escaped; and B. was apprehended with the horse, and died innocently."†

But even where *all* the evidence on a trial is *direct*,

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* 3 Inst. 232.

† Hale's P. C., vol. ii. p. 289. [In 1816 was published a tract, entitled "The Theory of Presumptive Proof;" it was inserted as an appendix to the first American edition of Philips; to this pamphlet was subjoined eleven startling cases of erroneous convictions upon circumstantial evidence. The pamphlet made a noticeable sensation for a time, and had such an effect upon juries that some judges forbid counsel referring to it. See Cowen and Hill and Edwards' notes to Phil. Ev. edit. 1868, p. 590 [714]. A story is reported in the Gentleman's Magazine for 1762, said to be on the authority of Justice Dyer, of a trial for murder, in which the circumstances pointed strongly to the guilt of the prisoner, and eleven jurymen were for conviction, but the twelfth refusing to concur the jury were dismissed, and ultimately the prisoner discharged. Subsequently the dissenting juryman confessed to Justice Dyer that he himself was the murderer. Such stories are not entitled to any credence; it frequently happens, in cases which occasion great excitement (as in the case of Dr. Burdell), that persons wholly unconnected with the offense surrender themselves as the murderers; in the case of Dr. Burdell it actually occurred that a man, bearing the same name as one of the jurymen on the trial of the alleged murderer, claimed that he was on the jury, and was himself the murderer. Such confessions find a parallel in the extraordinary confessions of persons charged with witchcraft. Such confessions are attempted to be accounted for in Mr. Upham's book on Salem Witchcraft.

it may happen that the conclusion which the jury come to upon it is not grounded on truth; for not only may honest witnesses be themselves deceived, and give positive testimony of that which is not true; but dishonest witnesses may perjure themselves in their direct testimony. The state of society in the reign of Henry VI. must have been very bad, when Fortescue could at that time thus write of false witnesses;—he is speaking of the Trial by Witnesses (without a jury), according to the manner of the Civil Law, and says,—"By the course of Civil Law, the party, who, upon the trial, holds the affirmative side of the question is to produce his witnesses whom he is at liberty to name at his pleasure. On the other hand, a negative is incapable of being proved; I mean directly, though indirectly it is otherwise. Now, he may well be thought a person of an inconsiderable interest, and of less application, who, from the gross of mankind and all his acquaintance, cannot find out two, so devoid of conscience and all faith, who, through fear, inclination, affection, or for a bribe, will not be ready to gainsay the truth. So that the party, to make good his cause, is at his liberty to produce two of such a stamp; and if the other party had ever so much mind to object against them or their evidence, it will not always happen that they are or can be known by the party defendant in the cause, in order to call in question their life and conversation, that, as persons of a profligate character, they might be cross-examined; upon which account their evidence might be set aside: and seeing their evidence is in the affirmative, it is not so capable of being overthrown by circumstance, or any other indirect proofs."*

The last century furnishes an instance of a verdict

* Fortescue, De Laudibus Leg. Angl., ch. xxi.

founded on direct testimony, by which the witnesses perjured themselves, and by their false evidence took away the life of an innocent man. This is the well-known case of Macdaniel, Berry, and Jones, tried at the Old Bailey in January, 1754. In this case Joshua Kidden was tried for robbing Mary Jones on the highway. Mary Jones, the prosecutrix, swore very positively to the person of the prisoner, and to the circumstances of the robbery, in which she was confirmed by Berry. Kidden, on the evidence of these two witnesses, was convicted and executed. Afterwards the reward of £40, given by the Stat. 4 & 5 W. & M., c. 8, to those who should convict a highway robber, was divided among the prosecutrix Mary Jones, John Berry, Stephen Macdaniel and Thomas Cooper. The history of the prosecution lay concealed until August, 1754, when, another man being taken up on suspicion of being a thief, the charge against Kidden was discovered to have been a conspiracy and contrivance to obtain the reward.*

* Leach, 52. [A train of cars was thrown from the track, killing the engineer William L. Dodge. The accident was occasioned by some person having placed stones upon the track. John Tallmadge, a well-to-do farmer, was suspected of being the guilty person; the circumstances against him were, that the railroad ran through his farm, several of his cattle had been killed by passing trains, and he had been heard to say, he "Hoped to God the cars would run off," and he was reputed to be of a most vindictive disposition. The railroad company offered a reward for the discovery of the offender. Two men, natives of Ireland, came forward and deposed to having seen Tallmadge place the stones upon the track. Tallmadge was charged with the murder of Dodge, and, upon the evidence of these two men, a true bill was found, and Tallmadge was put upon his trial at Ballston Spa, New York, in December, 1849. Upon the trial it was satisfactorily shown, that at the time of the accident the two witnesses were in Ireland. Tallmadge was acquitted, and the witnesses detained to answer for their perjury, committed, no doubt, to obtain the reward offered by the railway company.

In the winter of 1856, a youth named Charles E. Sage, aged about 19, was missed from his home in Cromwell, near Middletown, Connecticut. Suspicion fell upon a man named Patrick Nugent of having murdered the

When a jury convict on direct evidence given by perjured persons, they are deceived by an artfully fabricated story. This power of invention may be found in persons who would abhor to apply it for any purpose of injury to, or tending to be hurtful to, others. We have the authority of Lord Clarendon that one of the most skillful fabricators of a false tale of things said and done by others was Dr. Williams, who was Keeper of the Great Seal in the time of James I., and Archbishop of York in the reign of Charles I. Of him Lord Clarendon says,—"He had a faculty of making relations of things done in his own presence, and discourses made to himself, or in his own hearing, with all the circumstances of answers and replies, and upon arguments of great moment; all which, upon examination, were still found to have nothing in them that was real, but to be the pure effect of his own invention." And the same historian relates of him, that after meeting and conference between the Archbishop and some of his friends on a matter of importance to the Archbishop, he "repeated the several and distinct discourse every man had

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lad, and put his body under the ice in the Connecticut river. Nugent was arrested, but discharged for want of evidence to connect him with the lad's disappearance. Some months after, a headless corpse was found in the river. From marks on the body, and from the clothing, this was supposed to be the body of Sage; there was also found the lining of an overcoat, answering the description of that worn by him just previous to his being lost. Again an interval, and a man named John A. Benson, a sailor, came to Cromwell, and accused Nugent of having murdered Sage. Benson stated he saw the murder committed, and assisted in putting away the remains; he accurately described the appearance, dress, &c., of Sage, and further stated that he came to Cromwell expressly to divulge his knowledge concerning the murder, as it preyed upon his mind. Nugent persistently denied his guilt, but exhibited signs of fear, which were construed as evidence of his guilt. A true bill for murder was found against Nugent, and his trial appointed to take place in December, 1857, at Hadden, Connecticut. In the mean time, Sage was discovered to be alive and living at Ithaca, New York. No motive was apparent for the conduct of Benson.]

made; in which he was so punctual, that he applied those phrases and expressions, and manner of speech, to the several men, which they were all taken notice of frequently to use; as many men have some peculiar words in discourse, which they are most delighted with, or by custom most addicted to." Lord Clarendon adds, "There was not indeed the least shadow of truth in the whole relation, except that there was such a meeting and conference."*

When on a trial evidence is given by two witnesses, each of whom directly and entirely contradicts the other, the verdict sometimes depends wholly on the preponderance, which, on a balance of their credit, the jury find to be in the credit of one of them; not credit founded on their characters alone, but on all the circumstances in evidence. In these cases, the only question for the jury is, whether they believe A. or B.; a question that often causes them much perplexity. The consideration of preponderance may arise where neither of the two witnesses is a party, nor the wife of a party, to the cause; or where one of the witnesses is a party, or the wife of a party, to the cause; and the other a witness for the opposite party: or where the two witnesses are themselves the opposed parties in the cause: or where one of the witnesses is the wife of the one party, and the other is the wife of the other party.

In a case of contradiction of this nature, if the jury on the evidence believe one or both of the witnesses to be dishonest, this belief alone may not remove their difficulty; it may still leave them much trouble to decide, to whose testimony they should give the greater weight. For supposing one only of the witnesses to be believed to be dishonest, his dishonesty may not so far

* Clarendon's Hist. of the Rebellion, vol. i. part iv. p. 345, ed. 1707.

infect and damage his whole evidence, as to make it vail before the weak evidence of the other, although honest, witness. And if both the witnesses are believed to be dishonest, this equality of character being settled, there will still remain the question, of the two, whose evidence is more to be trusted.

If the jury believe both the witnesses to be honest, and equally so, this necessarily contracts their inquiry, and saves them much trouble, for dishonesty is then out of the question. And in any case, whether the witnesses be honest or dishonest, so soon as the question of credit founded on character is settled, the jury, for the purpose of determining whether, of the two witnesses, they believe A. or B., will have to turn to other considerations authorized by the evidence; as, for instance, according to probability on the circumstances, whether this or that witness' original perception of things, he says he saw or heard, was perfect or defective; whether the impression they made on him was strong or weak; whether his remembrance of them is to be depended on. In these cases, if, after every consideration, the matter stands in effect simply thus: "The one saith, This is my son that liveth, and thy son is the dead: and the other saith, Nay; but thy son is the dead, and my son is the living;"* it is plain the jury will require the wisdom of Solomon to decide between two such direct and entire contradictions.

The difficulty a jury may sometimes have in coming to a right conclusion on evidence is thus forcibly stated by Bishop Sanderson, in a sermon preached by him at the Assizes, at Lincoln, in 1630: "And as he [the magistrate] may be ignorant in matter of fact, for want of due information; so may he secondly be doubt-

* 1 Kings, iii. 23.

ful in point of right, for want of clear and full evidence. Whereof also there may be divers reasons; and among the rest these which I shall now propose: First, the great diversity, yea, sometimes flat repugnancy and contrariety, that is between the informations on the one side, and on the other. For men are extremely partial, and will not tell their own tales with such sincerity and indifferency as they ought; but as much in favor of themselves, and to the prejudice of their adversaries, as they can devise to do with any show of probability. We used to say, one tale is good till another be told: and the proverb is true, in that sense wherein it was first meant, and is commonly understood. Solomon hath a proverb much to the same purpose,—'He that is first in his own tale seemeth righteous; but then his neighbor cometh and searcheth him out.' The meaning is plain, one tale is good; that is, whether it be so or not, it seemeth so at the first hearing. But if we will speak of things, not after the appearance, but according to truth, and pronounce of them as they are, and not as they seem; may we not much rather invert the proverb, and say: one tale cannot be good, till the other be told? That is, whether it be good or not, the judge may not give credit to either, till he hath heard both. Nay, may we not many times further say, when both tales are told, that neither is good? Because there is mostwhat in every man's tale a mixture of some falsehoods with some truths; whereby it may so happen sometimes, that he which hath in truth the more equity on his side, by the mingling in some easily discoverable falsehoods in telling his tale, may render his cause the more suspicious to him that heareth it, to think the whole tale naught; and he that hath indeed, and upon the whole matter, the worst cause, may yet, by the weaving in some evident truths, or pregnant probabilities, in the

telling of his tale, gain such credit with him that heareth it, that he will be very inclinable to believe the whole tale to be good. Or, howsoever, they may be both so equally false, or at least both so equally doubtful, as no one that heareth them can well tell whether of both to give credit to. It was so in the famous case of the two inmate harlots, whereof King Solomon had the hearing. The living child is mine, the dead one thine, saith the one; no, saith the other, the dead child is thine, and the living mine. Here were presumptions on both sides (for why should any woman challenge another woman's child?); but proofs on neither (for being there were none in the house but they two, neither of them could produce any witnesses). The case hung thus even: no more evidence on the one side than on the other; no less confidence on the one side than on the other. Solomon, indeed, by that wisdom wherewith God had endowed him in a transcendent measure, found out a means whereby to turn the scales, to untie that hard knot, and to discover the hidden truth. But what could a judge, or a jury, of no more than ordinary wisdom, then have been able to have said or done in such a case; but even to have left it as they found it? And truly for any thing I know, ignorance must have been their best excuse."*

By the English law a jury upon a trial consists of twelve men, and the whole twelve are required to be of one mind, to join unanimously in their verdict. Where there is much latitude of circumstance and reasoning, the nature of mankind is such, that men differ very materially in the opinions they form on a particular subject, be it religion, politics, or a branch of science or art. But the circumstances of a trial, the question

* Bishop Sanderson's Sermons, vol. i. p. 271, ed. 1681.

they raise, and the reasoning required to arrive at a verdict, are of a limited range; and yet on a question so circumscribed, it is sometimes found the jury differ in their opinions upon it, and from this want of unanimity are unable to return a verdict.

Supposing each of the twelve men, relatively to the rest, to possess equal intellectual powers, and equal qualifications of other kinds, required for the discharge of their duty, it may be expected that they will easily agree in their conclusion upon the evidence. But when a jury, as often is the case, are selected from a large number of men, and, as regards the persons chosen, are brought together without distinction of mental powers or acquirements, without consideration of age, their professions, their trades, their habits, and manner of life, it is not to be wondered at, and is rather to be expected, that a difference of opinion among them should sometimes be found. Each is exactly the same man in court as he was out of it: whatever powers of mind, whatever habit of reasoning, whatever notions, whatever love of his own opinion, and obstinacy in adhering to it, "stiff in opinions, always in the wrong,"* —in a word, whatever good or ill quality he possessed out of court, this he brings with him into it.

Among the jury may be men, who, some too quick, and others too slow, in arriving at a decision upon any subject, are thus described by Archbishop Whately: "It is worth remarking, that many persons are of such a disposition, as to be nearly incapable of *remaining* in doubt on any point, that is not wholly uninteresting to them. They speedily make up their minds on each question, and come to *some* conclusion, whether there

* Absalom and Ahithophel.

are any goods grounds for it, or not. And judging, as men are apt to do in all matters, of others from themselves, they usually discredit the most solemn assurances of any one who professes to be in a state of doubt on some question; taking it for granted that, if you do not adopt their opinion, you must be of the opposite. Others, again, there are, who are capable of remaining in doubt, as long as the reasons on each side seem exactly *balanced;* but not otherwise. Such a person, as soon as he perceives any, the smallest, preponderance of probability on one side of a question, can no more refrain from deciding immediately, and with full conviction, on that side, than he could continue to stand, after having lost his equilibrium, in a slanting position, like the famous tower at Pisa. And he will, accordingly, be disposed to consider an acknowledgment, that there are somewhat the stronger reasons on one side, as equivalent to a confident decision. . . . . The infirmities above mentioned are those of *ordinary* minds. A smaller number of persons, among whom, however, are to be found a larger proportion of the intelligent, are prone to the opposite extreme; that of not deciding, as long as there are reasons to be found on both sides, even though there may be a clear and strong preponderance on the one, and even though the case may be such as to call for a practical decision. As the one description of men rush hastily to a conclusion, and trouble themselves little about premises, so the other carefully examine premises, and care too little for conclusions. The one decide without inquiring, the other inquire without deciding."*

Of the jury assembled it will always be found, that

* Bacon's Essays, with Annotations by Archb. Whately, p. 238, ed. 1856.

one man hears better than another, has a quicker apprehension of what a witness says, understands it more readily, has a better memory, is less subject to absence of mind, keeps his mind more attentive to what is going on, wandering neither from habit, nor from any accidental noise or other chance incident in court. The superiority of one man implies the inferiority of another in these respects. And from this difference between them, it may well be expected, and indeed it can scarcely be otherwise, that the two men, when they leave the jury-box to consider their verdict, will carry with them some facts, which they share in common, and others in which one of them does not participate with the other. Indeed if the twelve men could, so soon as they enter the room, to which they retire, throw down upon the table to ocular inspection, each man his own store of facts, brought with him from the court, it is probable that the contributions of no two men would be seen to be exactly alike.

But supposing the superiority and inferiority above noticed not to exist, but all the twelve men, in each of the respects adverted to, to stand on a perfect equality; in this case, they will all equally hear, understand, and remember the facts given in evidence, and yet they may differ in the conclusion they come to upon them. Their disagreement then will not be on the facts, on what is proved to have been seen and heard, objects of the witnesses' eyes and ears; for these matters the jury will all admit and agree in; but their difference may be on some mental abstraction, the mind's inference from the facts; different men may draw different inferences from them. And here will come into play each man's peculiar force and turn of mind, his peculiar notions and convictions he entertains on this or that particular subject, and which have been generated,

it may be, by his knowledge or ignorance, his great or little experience, by his just or defective reasoning, or even by his fancy or caprice; in a word, there will here come into play, the very same force and turn of mind, notions and convictions, which he possessed before he entered the court, and which accompanied him into it.

From what is proved to have been seen or heard, the mental abstraction or inference may be,—a promise, or intention, or negligence. From the proofs one man may infer a particular promise; as a promise to do certain work, to pay a debt, to marry a particular person; or may infer a particular intention; as an intention to commit a robbery. And, in either case, another man may fail to draw the same inference. Negligence is separable into kinds, and the kind is determined by the subject-matter of it. Many persons have in their minds a loose, undefined, notion of negligence; and this some, without consideration, are prepared to apply to any subject; but it is clear that some persons are wholly unqualified to judge of negligence in particular instances; as for example, in a question of negligence, imputable to one or other of the drivers of two carriages, which come into collision; or a question of negligence charged upon the steersmen of two vessels, driven one against the other. In either case, a loose, undefined notion of negligence will not suffice to cast the blame of it on this man or on that. To judge of the driver's imputed negligence, a person must have a certain knowledge of the art and skill required in driving, the duties of the driver, and his incidental difficulties. And the like may be said of negligence imputed to a steersman of a vessel. So that in these particular instances of negligence, it may very well happen, that a jury may differ in their opinions, some being better qualified than the rest to come to a right

conclusion upon it. The principle of this diversity of opinion, namely, the different qualifications of the men to judge of the matter, is applicable, if not to all, at least to all the usual questions which come before a jury.

In a case of circumstantial evidence, where guilt may, or may not, be inferred from the direct evidence given, some of the jury may think the evidence will justify them in drawing the inference, and others of them may think it will not.

The required unanimity of a jury is not an unfrequent subject of surprise and censure. A distinguished writer, to whom the requisition seems singular, offers some reasons, on which he thinks it is founded. He thus speaks of it:—"The unanimity of the twelve jurors in their verdict must be admitted to be a very singular institution. It should seem that the reason for requiring this, at least in criminal prosecutions, arose from compassion to the prisoner; against whom, if the offense was not proved beyond all possibility of doubt in the most scrupulous juror, it was thought to be erring on the merciful side that this single *veto* should acquit him. Another reason for this unanimity might possibly have arisen from attaints being frequently brought in ancient times against juries, to which punishment every juror was liable; as each individual, therefore, might be subject to a conviction in such a prosecution, it might be reasonable that every one should have a power of dissenting, and not be concluded by the opinion of others. The first of these reasons may account for the necessary unanimity in criminal suits, and the latter in those of a civil nature, in which cases only the prosecution of attaint took place. Another cause for the unanimity of a jury might possibly arise, from their being unwilling that

individuals might be obnoxious to the Crown, or perhaps parties, if the opinion of each was separately known. When the verdict was unanimous, '*Defendit numerus, junctæque umbone phalanges.*'" *

A late eminent Scotch lawyer, who believed it to be absurd to require unanimity in a jury, gives the following account of the introduction of the Jury Court into Scotland:—"One great outcry against this court at first was excited by our being required to adopt the English *unanimity* of juries. We had been accustomed to it far above a century in the Exchequer, which was an English court. But its sittings were solely in Edinburgh, and its verdicts were of a penal nature; so that the country at large knew little about its proceedings, and it had not to deal with the complexity of civil competitions. It therefore got on without much practical obstruction. But when it was proposed to carry the principle into all proofs, and all over the land, hosts of fiery objectors started up, who on grounds logical, political, metaphysical and religious, denounced the scheme as justifying rebellion at the least. The religious objection, which resolved into the perjury (as it was called) of the minority, sacrificing its conscience to the conscience of the majority, was the one that made the deepest impression on the Scotch mind. Meadowbank wrote a good pamphlet explanatory of the true working of the principle of unanimity, which operates (as he said) by producing discussion and concession among jurors, and thus makes a verdict by even compulsory unanimity a truer extract of the average sense of the whole of them, than if all reasoning had been superseded by a vote. There is some ingenuity in this, which is all that can be said in defense of the

* Barrington on the Statutes, p. 20, 5th. ed.

venerable English habit. But if it was sound, it is odd that of all the tribes of mankind the habit has been tolerated in England alone. I believe it to be absurd; and that, whether a bare majority ought to be allowed to decide or not, always requiring unanimity is nonsense. Experience has not in the least diminished our Scotch aversion to it." *

If we do not take experience for our guide, it may indeed be thought, that to require one mind in a jury must be a source of constant difficulty. But after the experience of some centuries, this is by no means found to be the case; and of the multitude of causes every year decided, the number, in which the jury are unable to agree, is extremely small, compared with the number in which they are unanimous. The reason of this may be, that sometimes each juryman at first takes essentially the same view of the case that his fellows do; and that at other times, when among them there are differences in their impressions and inferences, these differences are combated and overcome by good sense, good temper, and free discussion, a discussion in which they mutually give and take corrections of their views, they not disdaining to defer to the opinions of their fellows, a deference lawful, and which they may the less hesitate to yield, since the jurymen, to whom they defer, form and express those very opinions upon their oaths.

Frequently a jury are advised to look at the question before them, as "sensible men," as "men of common sense." In these cases it is assumed, and rightly so, that the jury are sensible men, men of common sense; for of such persons a jury is, beyond all doubt, very generally composed. And yet there may be exceptions, if, as Southey testifies, common sense is rare;

* Cockburn's Memorials of his Time, p. 300, ed. 1856.

for he speaks of it, as "that best and rarest of all senses, called Common Sense." * And it certainly sometimes happens, that a jury give a verdict startling to sober ordinary minds, one that takes the auditory by surprise; a verdict returned to the great astonishment of all present. In these cases, if the verdict be right, it is clear the jury are the sensible men, they have more common sense than their audience, although thirty, forty, or fifty-fold more numerous. And if the verdict be wrong, it may be a comfort to the jury, among themselves, in their relation the one to the other, to feel that they have erred in company; and, in their relation to the public, it may be a consolation to them to know, that if on a point of *fact* they have made a blunder, a court in Westminster Hall has occasionally on a point of *law* given a judgment, which another court in the same Hall has pronounced to be, in one instance, "a shocking decision;" † in another, an "extraordinary" case; ‡ and in a third, a case that "ought not to have been decided as it was." §

Sometimes a jury are exhorted to judge of a case, as men having a knowledge of the world. What is it to have a knowledge of the world? What is the world?

One of Dr. Johnson's definitions of world is, "Public life; the Public." And, according to Southey, "There is the Fashionable Public, and the Religious Public, and the Playgoing Public, and the Sporting

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* The Doctor, vol. ii. p. 86, ed. 1834. † 1 Taunt. 292.

‡ 14 Vesey, 175.

§ 19 Ves. 479. [The collection of overruled cases, published by Greenleaf, and of which a second edition was compiled by ourselves in 1856, testifies to the immense number of errors on points of law, committed by courts of justice.]

Public, and the Commercial Public, and the Literary Public, and the Reading Public: they call themselves Worlds sometimes." *

Others of Dr. Johnson's definitions of world are,—"The manners of men; the practice of life;" and these he gives on the authorities of Dryden, Addison and Swift.

"The Monkey who had seen the world" (Gay's Monkey), on his return home gives to his compatriots, "the hairy sylvans, who round him press," an account of "the manners of men; the practice of life."

The Vicar of Wakefield saw much of the world, both at home and abroad; and particularly at the fair, where he sold his horse, old Blackberry, to Mr. Jenkinson. In prison, too, he saw something of life; and of a fellow prisoner, the same Mr. Jenkinson, who bought the horse, "but forgot to pay for him," he says,—"I found this to be a knowing man, of strong unlettered sense, but a thorough knowledge of the world, as it is called, or, more properly speaking, of human nature on the wrong side." A fair also was fatal to the Vicar's son Moses, who there sold the colt, and laid out the money for it in a "bargain"—a gross of green spectacles.†

The Monkey of Gay saw the vanities and vices of polite society. So also did Dr. Primrose. And he and his son bought, and dearly too, experience in the ways of a lower society, that of cheats and swindlers.

The practices of life which Parnel's Hermit saw are of a graver character:

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* The Doctor, vol. ii. p. 22, ed. 1834, [and see Tristram Shandy, ch. vii.]

† The Vicar of Wakefield, ch. xii. xxv.

> "To know the world by sight,
> To find if books or swains report it right,
> He quits his cell,"

and sees—theft and murder.

The worlds mentioned by Johnson and Southey, all in their turn, pass in review before a jury. By turns a jury see, with the Monkey of Gay, the vanities and vices of polite society; with Dr. Primrose and his son, the ways of cheats and swindlers; and with Parnel's Hermit, the practices of thieves and murderers.

On a criminal trial a jury is usually instructed by the judge, that if after their consideration of the evidence, they have a doubt of the prisoner's guilt, the prisoner is entitled to the benefit of that doubt, and they ought to acquit him. In these cases the word doubt is often qualified by expressions accompanying it; as, "reasonable doubt," "rational doubt," "a doubt which, as sensible men, the jury think has weight, but not a trivial doubt created by ingenuity."

Meanings, which Dr. Johnson assigns to "doubt," are—"uncertainty of mind; suspense; undetermined state of opinion;" and one of his authorities is this from Locke,—"Those, who have examined it, are thereby got past doubt in all the doctrines they profess." To the verb, doubt, Dr. Johnson gives the meanings,—"To question; to be in uncertainty;" and one of his examples is the following from Hooker:—"Even in matters divine, concerning some things, we may lawfully doubt, and suspend our judgment, inclining neither to one side or other."

From the opening of a criminal trial to the close of the evidence, the witnesses gradually unroll the circumstances before the jury; some pointing to guilt, others, it may be, to innocence; and some perhaps are neutral, inclining to neither. Of the two former kinds, pieces

of the evidence, one after the other, are placed in the scale of guilt, or in that of innocence. And if at the end, the jury having, individually and collectively, weighed the evidence with care, they come to the determination, that the scales of guilt and innocence stand even, neither of them inclining to the one side or the other, the effect will be, the jury will doubt, and giving the prisoner the benefit of this doubt, they will say not guilty.

When it is said the doubt must be that of "sensible" men, "not a trivial doubt created by ingenuity," one import of these expressions may be, that the doubt must spring from, and be justified by, the evidence alone, to the entire exclusion of all surmises, which the jury might entertain of circumstances not contained in the evidence; as their surmises of things, which possibly may have happened, but which the evidence does not prove did happen: as, for instance, supposing it to be proved, that certain property was found in the possession of the prisoner; it may be in his power to prove it was bought by him, or given to him; but in the absence of this proof, the jury are not to surmise the purchase or the gift, and then, mixing it up with the evidence, arrive at their verdict on the evidence and their surmises combined: they must let the evidence stand as it is; it roundly rejects all interference with it by surmises.

Were it not that the force of a covenant is merged in the sanctity of an oath, the jury's oath to give "a true verdict according to the evidence;" each juryman might sometimes be exhorted to say, in the fervor of feeling of Chief Justice Crew, when delivering his opinion to the House of Lords, in the great cause on the title of Robert de Vere to the Earldom of Oxford,

—"I have labored to make a covenant with myself, that affection may not press upon judgment."*

This accords with the duty which Cicero imposes on a judge,—to lay aside the character of friend, on taking that of judge.†

Cicero in one of his addresses to a jury specifically points out to them certain duties which a jury must attend to: they are to consider that not only a power, but a trust, is given to them; it may be their duty to acquit their enemy, and convict their friend; they must consider not what their own inclinations would lead them to do, but what the law and their oaths oblige them to do; they are not at liberty to do as they please; but must bear in mind what law and equity, and their oaths, require of them; they must banish from their minds all humor and caprice, hatred, envy, fear, and all sorts of bad passions; and above all they are to take conscience for their guide; that monitor, he says, which we have received from Heaven, of which we cannot divest ourselves and which, if we take it as our companion and guide through life, will enable us to live without fear and with all honor.‡

This advice of Cicero appears to have been very necessary at Rome, where it is said juries often, out of envy or dislike, despoiled the wealthy, and, from compassion, enriched the poor.§

A desire, "that affection may not press upon judgment," does not mean, that a jury are to be indifferent on which side their verdict is given, are to exclude all wish toward either side. A wish toward one side is quite consistent with impartiality between both. Such a consistency is noticed by Archbishop Secker, rela-

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* Sir W. Jones' Rep. 101.

† Cic., Off. iii. 10.

‡ Cic., Pro Cluentio, 58.

§ Terence, Phormio, A. ii. S. 1.

tively to an inquiry concerning the truth of the Christian Religion. He is combating a false notion, "that we ought to divest ourselves of all desire to find religion true, before we go about to judge of it." A person, he says, making the inquiry will take care not to be misled by his desire, but he ought not to be indifferent concerning a point on which his eternal happiness depends. "Nor," he continues, "is this the only case, far from it, in which we are bound to wish on one side, and yet determine fairly between both. In judicial proceedings, a benevolent magistrate will constantly wish, that whoever is accused before him may prove innocent: notwithstanding which, he will try his cause with the most upright impartiality."*

How dispassionate, how free from all bias and prejudice, ought a jury to enter upon and exercise their duty! With what patience ought they to hear all the evidence; what deliberation and care ought they to use to arrive at a just verdict! That verdict is to administer even-handed justice; it may affect a man's estate, or person, or both. By their verdict the estate of one man to-day may be another's to-morrow, "'Twas mine, 'tis his."

And to what a fearful extent may a verdict affect a person! It may pronounce a man sane or insane; it may establish character, or take it away; it may give liberty to the captive, or turn liberty into slavery; it may continue life to a prisoner, or consign him to death.†

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* Sermons, vol. i. p. 10, ed. 1771.

† "'Go, crucify that slave.' 'For what offence?
Who the accuser? Where the evidence?
For when the life of man is in debate,
No time can be too long, no care too great;
Hear all, weigh all with caution.'"

GIFFORD.—*Juvenal Sat.*, vi. 218.

When a jury sit in judgment on a homicide, although by their verdict his life will be forfeited, they must not suffer pity for him to mingle with their oaths, and to divert the course of justice. To this pity, they should add the reflection, that his *victim* claims compassion too.*

On Trial by Jury many eulogies have been shed; but this spoken by Sir James Mackintosh in his Defence of Jean Peltier, charged with a libel on Buonaparte, First Consul, is probably unsurpassed in beauty: "He now comes before you, perfectly satisfied that an English Jury is the most refreshing prospect that the eye of accused innocence ever met in a human tribunal."†

Happy is the country, in which it can be said, as it was at Ephesus, "The law is open, let them implead one another." In a rude state of society, under the sway of private vengeance, a man's hand "will be against every man, and every man's hand against him." Laws cannot prevent it.‡ And even in civilized states, what day passes without "wrong and robbery?"§

In countries in the most advanced state of civilization, not only is private vengeance or redress as far as possible curbed by law; but laws are made suited to all the common exigencies of mankind; and not only to prevent and punish wrongs, but also to govern the peaceful transactions of life, men's acquisitions and dispositions of property, and their home and foreign trades. In these countries a law-suit is not necessarily an effect of quarrel and litigiousness; and many suits are "amicable." Yet law-suits, however "amicable," are not in general favorites; and "*Lis nunquam*" (to

* Wordsworth's Sonnets on the Punishment of Death.

† Sir J. Mackintosh's Miscellaneous Works, vol. iii. p. 245.

‡ Ovid., Trist., Lib. V., El. vii. 147. § Juvenal, Sat., xiii. 23.

have no law-suit) has been placed among the felicities of life.*

These two things merit the reflection of any one, who desires to make a law-suit an instrument of injustice; who tries to carry his cause by cunning and falsehood:

One is, that, if he be successful, his own conscience will avenge the crime.† The other is, that the truth may be too strong for him, and his attempt may fail.‡

In a sermon preached at the assizes at Lincoln in 1625, Bishop Sanderson takes these verses in Exodus, ch. xxiii.,—"Thou shalt not raise a false report; Put not thine hand with the wicked to be an unrighteous witness; Thou shalt not follow a multitude to do evil; Neither shalt thou speak in a cause, to decline after many to wrest judgment;"—and from these verses he gives to "the accuser, the witness, the juror, the pleader," to each of them, "some brief intimation of their duty." This intimation is thus expressed:

"If thou comest hither, then, as a plaintiff, or other party in a civil cause, or to give voluntary information upon a statute, or to prosecute against a malefactor, or in any way in the nature of an accuser; let neither the hope of gain, or of any other advantage, to thyself, nor secret malice or envy against thine adversary, nor thy desire to give satisfaction to any third party, sway thee beyond the bounds of truth and equity; no, not a little, either to devise an untruth against thy neighbor of thine own head, or by a hard construction to deprave the harmless actions or speeches of others, or to make them worse than they are by unjust aggravations,

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* Martial. † Juvenal, Sat. xiii. 1; Ibid, 96.

‡ Great is the force of truth; man's crafty fictitious tales are powerless against it.—*Cic. Pro Cœlio*, 26. Eloquence is not all in all; certain truths are so strong, that nothing can weaken them.—*Cic. Pro Quintio*, 26.

or to take advantage of letters and syllables to entrap innocency without a fault. When thou art to open thy mouth against thy brother, set the first rule of that text as a watch before the door of thy lips, Thou shalt not raise a false report.

"If thou comest hither, secondly, to be used as a witness; perhaps *Græcâ fide*, like a downright Knight of the Post, that maketh an oath a jest, and a pastime of deposition; or dealt withal by a bribe, or suborned by thy landlord or great neighbor, or egged on with thy own spleen or malice, to swear and forswear as they shall prompt thee; or to interchange deposition with thy friend, as they used to do in Greece, *Hodie mihi Cras tibi* (swear thou for me, to-day, I'll swear for thee to-morrow); or tempted with any corrupt respect whatsoever, by thy word or oath to strengthen a false and unrighteous report; when thou comest to lay thy hand upon the book, lay the second rule in that text to thy heart,—Put not thy hand with the wicked to be an unrighteous witness. Though hand join in hand, the false witness shall not be unpunished.

"If thou comest hither, thirdly, to serve for the King upon the grand inquest, or between party and party, in any cause whatsoever (like those *selecti judices* among the Romans, whom the Prætor for the year being was to nominate, and that upon oath, out of the most able and serviceable men in his judgment, both for estate, understanding and integrity), or to serve upon the *Tales*, perhaps at thine own suit to get something toward bearing charges for thy journey; or yoked with a crafty or a willful foreman, that is made beforehand, and a mess of tame after-men withal, that dare not think of being wiser than their leader; or unwilling to stickle against a major part, whether they go right or wrong; or resolved already upon the verdict, no

matter what the evidence be; consider what is the weight and religion of an oath. Remember that he sinneth not less, that sinneth with company. Whatsoever the rest do, resolve thou to do no otherwise than as God shall put into thy heart, and as the evidence shall lead thee. The third rule in that text must be thy rule, Thou shalt not follow a multitude to do evil. They are silly, that, in point either of religion or justice, would teach us to measure either truth, or right, by multitudes.

"If thou comest hither, fourthly, as to thine harvest, to reap some fruit of thy long and expenseful study in the laws, to assist thy client and his cause with thy counsel, learning and eloquence; think not because thou speakest for thy fee, that therefore thy tongue is not thine own, but thou must speak what thy client will have thee speak, be it true or false; neither think because thou hast the liberty of the court, and perhaps the favor of the judge, that therefore thy tongue is thine own, and thou mayest speak thy pleasure to the prejudice of the adversaries, person or cause: seek not preposterously to win the name of a good lawyer, by wresting and perverting good laws; or the opinion of the best counsellor, by giving the worst and shrewdest counsel. Count it not, as Protagoras did, the glory of thy profession, by subtilty of wit, and volubility of tongue, to make the worst cause the better; but like a good man, as well as good orator, use the power of thy tongue and wit to shame impudence, and protect innocency, to crush oppressors, and succor the afflicted, to advance justice and equity, and to help them to right that suffer wrong. Let it be as a ruled case to thee in all thy pleadings, not to speak in any cause to wrest judgment."*

* Bishop Sanderson's Sermons, vol. ii. p. 131, ed. 1681.

Thus honestly and boldly did Bishop Sanderson, in the 17th century, set before the accuser, the witness, the juror, and the pleader, their separate duties. And again did another bishop, in the 18th century, with equal honesty and boldness, give sound admonitions to parties to a cause, their witnesses, and advocates. This is Archbishop Secker, who, in one of his sermons upon oaths, a sermon on the Third Commandment, takes occasion to make the following remarks: "If ever we assert anything upon oath, which we know or believe to be false: if we deny anything, which we know or believe to be true: if we either affirm, or deny, in matters of which we know nothing: or if, in matters of which we do know something, we speak beyond our knowledge; declaring ourselves to be certain of what we only believe; or to believe firmly what we only suspect or guess: every one of these things, in its different degree, is profaning the name of God to attest a falsehood. And further, if, when we are sworn to tell the whole truth, we conceal designedly any part of it, which we think may be of moment; here again we are guilty of breaking our oath. Nay, indeed, though we are not sworn to tell the whole, yet we should observe, that the only reason of giving evidence at all is, that right may be done; and suppressing a truth may sometimes as entirely mislead and deceive, as telling the grossest falsehood. In short, then, if we use any method whatever, be it aggravating, or be it palliating, to disguise the real state of the case; if we relate it in any other manner whatever than the fairest and plainest we can, after diligently recollecting and considering well; every such artifice amounts to a violation of this great law of God. . . . . And greatly akin to the guilt of being perjured ourselves, nay often as bad, and sometimes worse, if possible, is that of inducing

others to be perjured: a sin which is committed, not only by direct hiring of them to swear falsehoods, but by awing and intimidating; by courting and flattering; by intimating advantages to them, if they can truly swear so and so; by talking them into a persuasion of what they were not fully persuaded of before; and thus making them strain hard to believe, that they know or remember more or less than they do. Another way, and a very wicked one, of making witnesses forswear themselves is, when artful men contrive, that they shall use forms of words, of which they do not thoroughly understand the import; or disconcert them so, on their appearance in a court of justice, by improper treatment of them; and astonish and confound them in such a manner, by a multiplicity of captious questions; that they hinder them from speaking the truth, which they intended, or drive them into saying falsehoods, which they did not intend."*

If the duties pointed out by Bishop Sanderson to the accuser, the witness, the juror, and the pleader, are not attended to, no presiding judge, in the opinion of the same prelate, will be able to ensure justice: "For say a judge be never so honestly minded, never so zealous of the truth, never so careful to do right, yet if there be a spiteful accuser, that will suggest any thing; or an audacious witness, that will swear any thing; or a crafty pleader, that will maintain any thing; or a tame jury, that will swallow any thing; the judge who is tied (as it is meet he should) to proceed *secundum allegata et probata*, cannot, with his best care and wisdom, prevent it, but that sometimes justice shall be perverted, innocency oppressed, and guilty ones justified."†

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* Secker's Sermons, vol. iv. p. 253, ed. 1771.

† Bishop Sanderson's Sermons, vol. ii. p. 102, ed. 1681.

If the same duties are observed, the probable result will be, the acquisition of justice, the triumph of truth over falsehood.

Addison, in one of his papers in the *Spectator*, represents two opposing armies, at the head of one of which was TRUTH, of the other, FALSEHOOD. He thus describes their meeting, and the overthrow of FALSEHOOD: "The goddess of FALSEHOOD was of a gigantick stature, and advanced some paces before the front of her army; but as the dazzling light, which flowed from TRUTH, began to shine upon her, she faded insensibly; insomuch that, in a little space, she looked rather like a huge phantom, than a real substance. At length, as the goddess of TRUTH approached still nearer to her, she fell away entirely, and vanished amidst the brightness of her presence; so that there did not remain the least trace or impression of her figure in the place where she had been seen."*

"So fares it, when with Truth Falsehood contends,"†

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* The Spectator, No. 63.

† Paradise Regained, Bk. iii.

APPENDIX.

APPENDIX.

The following rules for the examination of witnesses were published some years since by David Paul Brown, of the Philadelphia Bar, they were by him entitled:

Golden Rules for the Examination of Witnesses.

FIRST, AS TO YOUR OWN WITNESSES.

I.—If they are bold, and may injure your cause by pertness or forwardness, observe a gravity and ceremony of manner toward them which may be calculated to repress their assurance.

II.—If they are alarmed or diffident, and their thoughts are evidently scattered, commence your examinations with matters of a familiar character, remotely connected with the subject of their alarm, or the matter in issue; as for instance—Where do you live? Do you know the parties? How long have you known them, etc. And when you have restored them to their composure, and the mind has regained its equilibrium, proceed to the more essential features of the case, being careful to be mild and distinct in your approaches, lest you may again trouble the fountain from which you are to drink.

III.—If the evidence of your own witnesses be unfavorable to you (which should always be carefully guarded against), exhibit no want of composure; for there are many minds that form opinions of the nature or character of testimony chiefly from the effect which it may appear to produce upon the counsel.

IV.—If you perceive that the *mind* of the witness is imbued with prejudices against your client, hope but little from such a quarter—unless there be some facts which are essential to your client's protection, and which that witness alone can prove, either do not call him, or get rid of him as soon as possible. If the opposite counsel perceive

the bias to which I have referred, he may employ it to your ruin. In judicial inquiries, of all possible evils, the worst and the least to be resisted is an enemy in the disguise of a friend. You cannot impeach him—you cannot cross-examine him—you cannot disarm him—you cannot indirectly, even, assail him,; and if you exercise the only privilege that is left to you, and call other witnesses for the purposes of explanation, you must bear in mind that, instead of carrying the war into the enemy's country, the struggle is still between sections of your own forces, and in the very heart, perhaps, of your own camp. Avoid this, by all means.

V.—Never call a witness whom your adversary will be compelled to call. This will afford you the privilege of cross-examination—take from your opponent the same privilege it thus gives to you—and, in addition thereto, not only render every thing unfavorable said by the witness doubly operative against the party calling him, but also deprive that party of the power of counteracting the effect of the testimony.

VI.—Never ask a question without an object—nor without being able to connect that object with the case, if objected to as irrelative.

VII.—Be careful not to put your question in such a *shape* that, if opposed for informality, you cannot sustain it, or at all events produce strong reason in its support. Frequent failures in the discussions of points of evidence enfeeble your strength in the estimation of the jury and greatly impair your hopes in the final result.

VIII.—Never object to a question from your adversary without being able and disposed to enforce the objection. Nothing is so monstrous as to be constantly making and withdrawing objections; it either indicates a want of correct perception *in making them*, or a deficiency of reason or of moral courage in *not making them good.*

IX.—Speak to your witness clearly and distinctly as if you were awake and engaged in a matter of interest—and make *him* also speak distinctly and to your question. How can it be supposed that the Court and Jury will be inclined to listen, when the only struggle seems to be whether the counsel or the witness shall first go to sleep?

X.—Modulate your voice as circumstances may direct—"Inspire the fearful and repress the bold."

XI.—Never begin before you are *ready*—and always finish when you have *done*. In other words, do not question for question's sake, but for an *answer*.

Cross-Examination.

I.—Except in indifferent matters, never take your eye from that of the witness; this is a channel of communication from mind to mind, the loss of which nothing can compensate.

> "Truth, falsehood, hatred, anger, scorn, despair,
> And all the passions—all the soul is there."

II.—Be not regardless, either, of the *voice* of the witness; next to the eye this is perhaps the best interpreter of his mind. The very design to screen conscience from crime,—the mental reservation of the witness,—is often manifested in the tone or accent, or emphasis of the voice. For instance, it becoming important to know that the witness was at the corner of Sixth and Chestnut streets at a certain time: The question is asked: were you at the corner of Sixth and Chestnut streets, at six o'clock? A frank witness would answer—perhaps—I was near there. But a witness who had been there, desirous to conceal the fact and to defeat your object, speaking to the letter rather than the spirit of the inquiry, answers, No; although he may have been within a stone's throw of the place or at the very place, within ten minutes of the time. The common answer of such a witness would be: I was not at the *corner*, at *six o'clock*.

Emphasis upon both words, plainly implies a mental evasion or equivocation, and gives rise with a skillful examiner to the question: At what hour were you at the corner, or at what place were you at six o'clock? And in nine instances out of ten it will appear, that the witness was at the place about the time, or at the time about the place. There is no scope for further illustrations—but be watchful, I say, of the voice, and the principle may be easily applied.

III.—Be mild with the mild—shrewd with the crafty—confiding with the honest—merciful to the young, the frail, or the fearful—rough to the ruffian, and a thunderbolt to the liar. But in all this, never be unmindful of your own dignity. Bring to bear all the powers of your mind—not that *you* may shine, but that *virtue* may triumph and your *cause* may prosper.

IV.—In a *criminal*, especially in a *capital* case, so long as your cause stands well ask but *few* questions; and be certain never to ask *any*, the answer to which, if against you, may destroy your client, unless you know the witness *perfectly* well, and know that his answer will be favorable *equally* well; or unless you be prepared with testimony to destroy him if he play traitor to the truth and your expectations.

V.—An equivocal question is almost as much to be avoided and condemned as an equivocal answer; and it alway *leads* to, or *excuses*, an equivocal answer. Singleness of purpose, clearly expressed, is the best trait in the examination of witnesses, whether they be honest or the reverse. Falsehood is not detected by cunning, but by the light of truth, or if by cunning, it is the cunning of the witness, and not of the counsel.

VI.—If the witness determine to be witty or refractory with you, you had better settle that account with him at *first*, or its items will increase with the examination. Let him have an opportunity of satisfying himself either that he has mistaken *your* power, or his *own*. But in any result, be careful that you do not lose your temper; anger is always either the precursor or evidence of assured defeat in every intellectual conflict.

VII.—Like a skillful chess player, in every move, fix your mind upon the combinations and relations of the game—partial and temporary success may otherwise end in total and remediless defeat.

VIII.—Never undervalue your adversary, but stand steadily upon your guard; a random blow may be just as fatal as though it were directed by the most consummate skill: the negligence of one often cures, and sometimes renders effective, the blunders of another.

IX.—Be respectful to the court and to the Jury—kind to your colleague—civil to your antagonist; but never sacrifice the slightest principle of duty to an overweening deference toward *either*.

PRACTICAL ADVICE FOR CONDUCTING

THE EXAMINATION OF WITNESSES.

[Abridged from Mr. Cox's work, entitled "The Advocate, his Training, Practice, Rights, and Duties."]

THE EXAMINATION-IN-CHIEF.

An impression prevails in the Profession, that the examination-in-chief is an easy task, which anybody may perform, and demanding neither ability nor experience. But this is a grave mistake, as will be discovered at the first experiment. The witnesses cannot always be relied upon in their statements made out of court. Nothing is more common than to find assertions, most confidently made in the office, retracted in the witness-box, under the sanction of an oath and the fear of cross-examination. It is often impossible by any vigilance to keep persons to the strict literal truth in their statements given in the office, and unless you are prepared for this kind of disappointment in your examination-in-chief you will be sorely disconcerted. And here let us warn you against the danger which inexperience frequently incurs, of being not only disconcerted by the witness failing to support his previous statements, but by exhibiting in countenance or manner the disappointment you feel. Let nothing, not even a tone of your voice, betray surprise, or it will assuredly reveal your weakness to your opponent, who may make use of the fact to discredit your witness and your cause, by the argument, always powerful, that the witness has told two different stories. Another rule of examination is, you should commit to memory the leading facts to be proved by the witness, or have a synopsis of them before you. If you read your questions from your brief, you will find it very difficult, whatever the necessity, to depart from the terms or the order there set down. But if you examine from your memory, or a brief outline of the facts, your whole attention will be given to the witness, your eye to his deportment, your mind to his words, and knowing what you want to have from him, you will be enabled to adapt your questions in accordance with what has preceded, and so as to procure the facts you are seeking. It happens frequently that new facts come out in exami-

nation, which materially alter the complexion of the case, and require a complete remodeling of the entire train of questions, with a view to elicit explanation and to make the whole consistent with your case. Such a position will demand the exercise of all your ingenuity and caution, and it is in such a position that the skill of the accomplished Advocate is discovered, far more than in those oratorical displays which win for him the applause of the public.

LEADING QUESTIONS.

The first great rule of practice in the examination-in-chief is, that you shall not put leading questions to your own witness—a leading question being such an one as suggests the answer. This rule is simple, and seemingly easy of application; but you will find it to be excessively difficult to be observed in practice, and indeed, if it were strictly enforced, a trial would be prolonged indefinitely. At the beginning of your practice probably you will be apt to err rather by its too strict observance, than by violating it. Nevertheless, as it is often enforced without necessity, merely for the sake of interruption, you must be prepared to cope with its difficulties, and we will endeavor to point out the most prominent of them.

But first observe, that the rule against leading questions is properly applicable *only to such questions as relate to the matter at issue.* It is permitted to you, and the Judges will encourage you in the practice, to lead the witness directly up to the point at issue. It saves time and clears the case, and if you narrowly observe experienced Advocates, you will find that they always adopt this course. For instance, instead of putting the introductory questions, "Where do you live?" "What are you?" and so forth, you should, unless there be some special reason to the contrary, directly put the leading question, "Are you a banker carrying on business in Wall street?" and so on, until you approach the questionable matter, when, of course, you will proceed to conduct the examination according to the strict rule.

But that rule is not so easily to be observed as you may suppose. Frequently it will occur, that you will have need to call the attention of the witness to something he may have forgotten—as thus: Suppose that you were examining as to a certain conversation. The witness has narrated the greater portion of it, but he has omitted a passage which is of importance to you. We know that, in fact, with all of us, in our calmest moments, it is difficult to repeat perfectly the whole of what was said at a certain interview, and if it had been a long one, probably we might repeat it half a dozen times, and each time omit a different portion of it, although in either case the omitted

part would be instantly recalled to our memories if we were asked, "Did he not also say so and so?" or, "Was not something said about so and so?" But this sort of reminiscent question you are not permitted to put to a witness, because it would be a leading question, although he is far more likely, in his agitation, to forget that he had not repeated the whole than we should be in our calmest moments. In vain you ask him, "Did any thing more pass between you?" "Was nothing more said?" "Have you stated all that occurred?" He does not in fact remember precisely what he had stated of it, or the portion you desire to obtain has escaped his memory for the moment. It would flash upon him instantly, if it were to be repeated, or even to be half uttered. But you may not help him so, and then there arises a perplexity, which every Advocate must often have experienced,—in what manner can this be recalled, without leading? Here is another occasion for the exercise of that ready tact in the conduct of an examination-in-chief which marks the skillful Advocate. Your endeavor must now be to suggest indirectly the forgotten statement: and to do so without violating the rule which in this respect is certainly pushed further than justice and fairness to the infirmity of human memory can sanction. As each case must depend upon its circumstances, it is impossible to lay down any rule to help you, or even to hint at forms of suggestion. But one method we may name, as having proved efficacious when others had failed, and that is, to make the witness repeat his account of the interview, or whatever it may be; then it will not unfrequently happen, as we have already observed, that he will remember and repeat the passage you require and omit something else which he had previously stated. But this, of course, matters not; your object has been gained, and your adversary may take what advantage he can of the difference in the statements. If the story is a long one, you will avoid inflicting this repetition of it, until other expedients have been tried in vain. It may be added, that a single word often suffices to suggest the whole sentence; if you have a quick wit, you may sometimes bring out the matter you want, by so framing a question that it shall contain a part of the forgotten sentence *ipsissimis verbis*, but otherwise applied.

TO AVOID CONFLICTING TESTIMONY.

Great caution is required in the examination of all your witnesses after the first, to prevent their disagreement in any important particulars. No error of inexperience or unskillfulness is more common than to examine a witness *according to the brief*, without reference to the evidence previously given and the requirements of the case as it

stands. If you fear that there may be conflicting testimony on any point, the first witness having varied from the statement in the brief, it is usually better to leave it as it stands upon that single testimony than to bring out a contradiction; but upon this you must exercise your sagacity at the moment; it must depend upon the particular facts of the case; we only suggest to you, that it is one of the difficulties of examination-in-chief, which you should be prepared to encounter. Anticipating it, you will not be taken by surprise when it occurs to you in your practice.

WITNESSES WHO PROVE TOO MUCH.

There are two kinds of troublesome witnesses whom you will have to encounter in the conduct of a cause—those who say too much, and those who say too little; your too eager friends, and your secret enemies. Of these, by far the most difficult to deal with are your over-zealous friends—your witnesses who *prove too much*. A very little experience will enable you to detect these personages almost at a glance, certainly after a few sentences. They usually try to look wonderfully easy and confident; answer off-hand, with extraordinary glibness, and give you twice as much information as you have asked for. Now, another rule of evidence is, that you shall not discredit your own witnesses, so that your only chance of dealing with these troublesome friends is to check them, at the very outset, by kindly, but gravely and peremptorily, requiring them to do no more than simply to answer the questions you may put to them, and then so to frame your questions that the answer to them shall be a plain "Yes" or "No," giving them no opportunity for expatiating. Keep them closely to the point for which they are required, and having got from them just what you want, dismiss them, right thankful if they have not done you more harm than good.

ADVERSE WITNESSES.

With your unfriendly witness, you must deal altogether after another fashion. There is no more difficult and delicate task, in the conduct of an examination-in-chief, than so skillfully to manage an *adverse* witness, called by yourself, that he shall state just so much as you require, and no more.

When the court is satisfied that the witness is really an adverse one, the strict rule which forbids leading questions will be relaxed, and you will be permitted to conduct the examination somewhat more after the manner of a cross-examination. But this is only a partial license. You may put leading questions, but you may not discredit

him, whatever may have been the damage done to you by his testimony, and however obvious the *animus* which has misrepresented the facts purposely for the injury of your cause. He is still *your* witness, and having chosen to call him, and thereby to ask the jury to believe his story, it is not competent to you to turn round, when you find he does not suit your purpose, and endeavor to show to the jury that he is unworthy of credit. The most you are allowed to do is to show the witness has made a mistake.

As a general rule, the less you say to such a witness the better for you. Bring him directly to the point which he is called to prove; frame your questions so that they shall afford the least possible room for evasion, or, what is still worse, *explanation*. Avail yourself of your liberty to lead as soon as you can—that is, as soon as you have laid the foundation for it by showing from his manner that the witness is really adverse. Make no secret of his enmity; on the contrary, you have most to dread when his manner and tone do *not* discover his feelings. If you are satisfied *beyond doubt* of his hostility, and he should, as is often seen, assume a frank and friendly mien in the witness-box, instead of accepting his approaches, reject them with indignation; let him see that you understand him and are not to be imposed upon, and endeavor to provoke him to the exhibition of his true feelings. The importance of so doing will be obvious to you when you remember that it is essential to the safety of your cause that the jury should receive his testimony with a knowledge of the circumstances under which it is given, so that any thing adverse to you which may fall from him shall be accepted by them with the allowance which is always made by reasonable men for the exaggerations or even inventions of an enemy; for, to an audience so prepared whatever falls from him in your favor will have double value given to it, and whatever he may say that tells against you will be rejected. Hence it is that the first care of a skillful Advocate, in dealing with his own adverse witness, is not only *not to conceal* the hostility, but to make it prominent—to provoke it to an open display, and *draw out* the expression of the feeling, if it does not sufficiently appear without a stimulus. If he be adverse at all, *you cannot make him appear too adverse*, because the more hostile he is the more will his evidence in your favor be esteemed, and the less weight will be given to such as he may utter against you.

TIMID WITNESSES.

If your witness be *timid*, it will be your care to restore his self-possession before you take him to the material part of his testimony.

This you should effect by assuming a cheerful and friendly manner and tone, and if you have the art to make him smile, your wit would be better timed than is always the case with forensic jests. Keep him thus employed upon the fringe of the case, until you are satisfied that his courage is restored, and then you may proceed with him as with any other witness. But be very careful not to take him to material topics while he is under the influence of fear, for in this state a witness is apt to become confused, and to contradict himself, and so to afford to your adversary a theme for damaging comment.

STUPID WITNESSES.

A *stupid* witness is often more troublesome than an adverse one. He cannot understand your questions, or answers them so imperfectly that he had better left them unanswered. With such an one the only resource is patience and good temper. If you are cross with him, you will be sure to increase his stupidity, and to convert evidence that means nothing into evidence that is contradictory and confused. The preservation of imperturbable good temper is a golden rule with an advocate. He should never be moved to anger by any thing, however provoking, and however he may *appear* to be in a passion. Entire self-command is his greatest virtue, never more in requisition than in dealing with a stupid witness. Instead of rebuking him, you should encourage him by a look and expression of approval, and you must frame your question in another shape better suited to his dense faculties. If baffled again, do not retreat, but renew the catechism until your object is obtained. In constructing your questions, you will often find a clue to his trains of thought by observing his answers, and your next question might then, with a little ingenuity, be so framed as to fall in with his train of ideas. Thus patiently treated, there are few witnesses so dull as not to be made efficient for the purpose of an examination-in-chief.

ORDER AND MANNER OF PUTTING QUESTIONS.

In the direct examination of witnesses, it is the better course to observe the order of *time*. That is not only the most easily intelligible to the jury, but it is the natural order in which events are associated in the mind of the witness, and therefore *by* which they are the most readily and accurately recalled. If you depart from this for the sake of bringing out facts that are connected together by some other link than time, as, for instance, to exhibit in its entirety one branch of your case, let the same principle govern the order of that, and then return to the original plan. But it will not do to re-

vert to the precise point where you quitted it; you should repeat the two or three questions with which you concluded, so as to recall your witness to the point from which you had diverted him. Inattention to this simple rule is often the occasion of no small perplexity to the witness, and it is scarcely necessary to warn you against *that*, of which advantage is certain to be taken to damage your case.

Your *manner* in examination-in-chief should be very different from that which you assume in cross-examination. You are dealing with your own witness, whom you assume to be friendly to you, unless informed to the contrary, when it is permitted to you to take the tone already described You must encourage him if he be timid, and win his confidence by a look and voice of friendliness. It often happens that witnesses, unaccustomed to courts of justice, are so alarmed at their own new position, that in their confusion they cannot at first distinguish between the friendly and the adverse counsel, and they treat you as an enemy to be kept at bay and to whom they are to impart as little as possible. It is then your care to set your witness right, and a kindly smile will often succeed in doing this. Do not appear to notice his embarrassment, for that is sure to increase it, but remove it quietly and imperceptibly by pleasant looks, friendly tones, and words that have not the stern sound of a catechism, but the familiar request of a companion to impart a story which the querist is anxious to hear and the other gratified to tell. The most frightened witness may thus be drawn almost unconsciously into a narrative which, when he entered the witness-box, had escaped his memory.

Your questions in examination-in-chief should be framed carefully and put deliberately. You never require in this that rapid fire of questions which, as we shall have occasion to show hereafter, is so often requisite in cross-examination. Nor in this have you need to put an immaterial question, save under the rare circumstances previously described. You should weigh every question in your mind before you put it, in order that it may be so framed as to bring out in answer just so much as you desire, and no more. You have time for this, if you are as quick of thought as an Advocate should be, while the judge is taking his note of the previous answer; but even if this be not sufficient for your purpose, you must not fear to make a deliberate pause. The court will soon learn not to be impatient of your seeming slowness, when it discovers that you have in fact abbreviated the work by a pause which has enabled you to keep the evidence strictly to the point at issue.

ALLOWING A WITNESS TO TELL HIS STORY HIS OWN WAY.

Sometimes it demands considerable discretion to determine whether it is better to permit the witness to tell his own story in his own way, or to take him through it by questions. No rule can be laid down for this; it must depend upon your discernment at the moment. There is a class of minds which can only recall facts by recalling all the associated circumstances, however irrelevant; they must repeat the whole of a long dialogue, and describe the most trivial occurrences of the time, in order to arrive at any particular part of the transaction. With such you have no help for it but to let them have their own way. It is the result of a peculiar mental constitution, and endeavors to disturb their trains of association will only produce inextricable confusion in the ideas of the witness, and you will be further than ever from arriving at your object. But if you are dealing with that other class of witnesses, happily more rare, who appear to have no trains of thought at all, who can observe no order of events, whose ideas are confused as to time, place and person, your only chance of extracting anything to your purpose is to begin by requesting that they will simply answer your questions, and, falling in, as it were, with their own mental condition, proceed to interrogate them after their own fashion, with *disconnected questions* and so endeavoring to draw out of them isolated facts, which you will afterwards connect together in your reply, or which may dovetail with the rest of the evidence, so as to form a complete story.

This plan will often be found effective with such witnesses, when all the usual methods of eliciting a narrative from them have been abandoned in despair. Of course it demands great tact and readiness; but it is presumed that unless you possess these qualities you will not attempt to become an Advocate.

RECALLING A WITNESS.

It will be your task, when reading and noting up your case, to marshal your witnesses in the order in which they will best support your case, as you have determined to submit it to the jury. But, inasmuch as you are not permitted to recall your witnesses, except with special permission of the court, given only under special circumstances, and you are therefore compelled to elicit all that you require in order to support any part of your case, where the same witness speaks to different parts of it, you must take care in his examination to separate his testimony, as it relates to each of such parts, and even at the expense of some repetition to take him through his evi-

dence as it bears upon one part before you take him to another, observing, however, the rules as to time and the manner of reverting to the former portion of the narrative, which have been previously described.

DUTIES OF OPPOSING COUNSEL PENDING THE EXAMINATION-IN-CHIEF.

While the examination-in-chief is proceeding, it is the duty of the counsel on the other side to give the most attentive ear to every question and every answer, and to take a note of them. When this duty devolves upon you, it may, perhaps, be performed all the more satisfactorily by the observance of some rules which experience has approved.

You must mark every question put to the witness, with a double purpose; first, to be sure that it is properly put, according to the rules of evidence, and, secondly, to ascertain what is its bearing upon the case, and the design of your adversary in putting it.

Great keenness of perception and readiness of apprehension are requisite to the proper performance of this task. You will need to have the law of evidence at your fingers' ends, that, if the question be an improper one, you may interpose instantly, *before the answer is given*, to forbid the witness to reply, and then not only to make your objection to the court, but to support it by *reasons*.

And here let us warn you against the fault of making too frequent and too frivolous objections. Many inexperienced men appear to think, that by continually carping at the questions put by the other side to the witnesses, they are proving to the audience how clever they are. But this is a mistake. Such an exhibition of captiousness, whether affected or real, is offensive to the court and to the jury. Nothing is more easy than to find opportunities for this sort of vanity, without starting objections actually untenable, because, in practice, a vast number of questions *are* put which, in strictness are leading, and, therefore, if objected to, could not be permitted. But you should *never* object to a question, as leading, *merely because it is such*, but only when it appears to you to be likely to have an effect injurious to your cause. And when you have occasion to make such an objection, do it good-temperedly, and as appealing to the better judgment of your opponent, whether he does not deem it to be an improper question; nor address the objection to the court in the first instance, but to your adversary, and only if he persists in putting it, should you call upon the court to decide between you which is right.

But it is not against improper leading questions you have to be upon the watch; there are many others, still more objectionable,

which it will be your duty, by an instant objection, to prevent. As soon as the words have fallen from your opponent's lips, and before the witness can have time to answer, you must interpose first, with an exclamation to the witness, "Don't answer that," and then, turning to the court, state what is your objection to the question, with your reason for it. Your opponent will answer you. Then you will have the right of replying, and the court will decide between you.

There is, perhaps, no part of the business of an Advocate in which the fruits of experience are more obvious than in this. If you watch closely the examinations of the witnesses, in a trial where an experienced Advocate is on the one side and an inexperienced one on the other, you will see the *practiced* man putting question after question, and eliciting facts most damaging to the other side, which his adversary might have shut out by a prompt objection to them, but which he permits to pass without protest, because he is not sufficiently practiced in the law of evidence to discern their illegality on the instant, or so much master of it as to give a reason for objection, even though he may have a sort of dim sense that the questions are wrong somehow, and he protests against leading questions, while he permits illegal questions, destructive to his client, to be put without a murmur. On the other hand, when it comes to his turn to examine his witnesses, and on the experienced man devolves the duty of watching, you will see how, in no single instance, is *he* suffered to tread over the traces; but the strictest rules of evidence are enforced upon him, so that he sits down, leaving half his case undeveloped, while his adversary has brought out all that *he* had desired to elicit.

IMPORTANCE OF KNOWLEDGE OF LAW OF EVIDENCE.

Hence, to the student aspiring to be an Advocate, the vital importance of a mastery of the law of evidence, as the branch of law which is not only most frequently in requisition by him, but the only one which he is called upon to propound without previous research. Almost all other subjects are notified to him before he goes into court, so that he may look into the law and prepare himself for the argument; or, if, as rarely happens, he is suddenly called upon, the court will always give time for research, or, at the least, allowance is made for an insufficiency common to his audience, even to the judge upon the bench. But, in questions of evidence, no such delay is practicable, and no such excuse is accepted. They necessarily arise on a sudden, and must be suddenly argued and decided. An Advocate is expected to be aware of this, and to come prepared with a knowledge of all the principles and rules of evidence. In order to

this, it is necessary to *keep up* his acquaintance with it, by continually refreshing his memory, not only by reading every day a portion of his favorite text-book, but by carefully reading, and then noting up in that text-book, which should be interleaved for the purpose, every case decided upon the law of evidence, as the reports issue; and it is of the extremest importance that he should possess the very latest decisions, for they will not unfrequently give him a victory over an adversary not so well prepared as himself with the *latest cases*.

While upon this subject, it may be convenient to add, that there is another class of cases of which an Advocate should be careful to procure the earliest intelligence, and should note with equal care in his book of practice; namely, such as may, perhaps, be best described under the collective title of "The Practice of *Nisi Prius*." We mean, by this, cases equally in sudden requisition with those on evidence, as determining the conduct of a trial; as the right to begin, notices, juries and verdicts, the measure of damages, exceptions, &c. Many a victory has been won solely by the superior diligence of an Advocate in thus possessing himself of the most recent decisions on cases of this class.

MINUTES OF TESTIMONY.

Your notes of the evidence, as it proceeds, should be fully taken, because you cannot anticipate at this period of the cause what portions of it may prove to be material, nor where a question may arise as to what was the witness' answer. In taking these notes, you begin with the day and date on which the trial took place, and the name of the judge. You then very briefly note the more important points of the opening speech, especially such points as you purpose to answer, and you indicate such as will require peculiar attention by scoring it twice or thrice. Then stating the name of the witness, and the counsel by whom he is examined, you set down his evidence, leaving a broad margin for your own observations, if any should occur to you. It is not necessary to give both question and answer, save where the question strikes you as one of special import, or to which you might desire thereafter to refer; it will suffice merely to give the answer in the witness' own words, as nearly as you can observe them, so as to make the statement intelligible. Thus, if the witness be asked, "Were you at Albany on Saturday?" and answers, "I was,"—a leading question, but probably not worth objecting to,—you set it down thus: "Was at Albany on Saturday." But let it be a rule, so far as it is practicable, always to take the very words used by the witness. As you proceed, you will find that the evidence suggests to

you matter to be explained on cross-examination, or to be answered in your speech for the defence, or to be contradicted by your own witness. Here it is that you will find the margin useful. When such an idea occurs to you, never suffer it to escape, trusting to recall it when it is wanted, for, amid the multiplicity of claims upon your attention, you cannot be assured that it will return; but grasp it instantly, and in the margin, against the evidence that is so to be treated, insert some mark which may catch your eye, and if the words are not likely to suggest the thought you desire to recall, you can, in a hurried sentence, there set down that of which you wish to be reminded. This plan is especially useful for the purpose of cross-examination, for it is extremely difficult to carry in the mind all the evidence-in-chief that needs to be explained or deprived of its credit; but, with this scored and noted report of the witness' testimony before you, it is unlikely that anything of moment will escape your attention.

EXAMINATION ON VOIR DIRE.

Another duty may devolve upon you, as Advocate—that is, the examination on the *voir dire*. This legal phrase means merely the examination to which a witness may be subjected, before he is admitted to be sworn, for the purpose of ascertaining if he is competent to be a witness. When, therefore, a witness is called, you must be prepared, if you have an objection to him, to state it *immediately on his appearance*, and before he is sworn to give his evidence between the parties; and, having intimated to the court that you have such an objection, *you* will proceed to examine him in support of it. This examination you will be permitted to conduct as in the nature of a cross-examination. Very few questions usually suffice; but if you are dealing with an acute witness, who knows your object, and especially with a professional one, no common skill and tact are often required to drag out of him the particular circumstances necessary to sustain your objection. The same rules apply to *voir dire* examinations as to cross-examinations.

We next proceed to consider what *you* should do in the conduct of your cross-examinations.

CROSS-EXAMINATION.

Cross-examination is commonly esteemed the severest test of an Advocate's skill, and perhaps it demands, beyond any other of his duties, the exercise of his *ingenuity*. But the experienced will doubt whether, upon the whole, it is so difficult to do *well* as an examination-in-chief, and certainly it is more frequently well done, although this

may not improbably result from the prevalent notion that examination-in-chief is an easy matter, which any body can do, while cross-examination is extremely difficult, and therefore the Advocates, and especially *young* Advocates, perform the one carelessly, while they put forth all their powers for the accomplishment of the other. Do not understand, however, that we are unconscious of the difficulty of conducting a cross-examination with creditable skill. It is undoubtedly a great *intellectual* effort; it is the direct conflict of mind with mind; it demands, not merely much knowledge of the human mind, its faculties, and their *modus operandi*, to be learned only by reading, reflection and observation, but much experience of man and his motives, as derived from intercourse with various classes and many persons, and, above all, by that practical experience in the art of dealing with witnesses which is more worth than all other knowledge; which other knowledge will materially assist, but without which no amount of study will suffice to accomplish an Advocate. To the on-looker, a cross-examination has much more of interest, for it is more in the nature of a combat, with the excitement that always attends a combat of any kind, physical or intellectual; it is man against man, mind wrestling with mind. Whereas, in examination-in-chief, the Advocate and his witness have the appearance, at least, of being allies, and whatever skill the former is required to exercise for the attainment of his object, needs to be concealed, and is seldom apparent to a mere spectator, however it may be recognized and appreciated by those who are engaged with him in the cause, and who know with what exquisite tact he has elicited just what he desired, and suppressed that which he wanted not to reveal.

TWO STYLES OF CROSS-EXAMINATION.

There are two *styles* of cross-examination, which we may term the *savage* style, and the *smiling* style. The aim of the savage style is to *terrify* the witness into telling the truth; the aim of the smiling style is to *win* him to a confession. The former is by far the most frequently in use, but its use is a great mistake. The passions rouse the passions. Anger, real or assumed, kindles anger. An attack stimulates to defiance. By showing suspicion of a witness, you insult his self-love—you make him your enemy at once—you arm his resolution to resist you—to defy you—to tell you no more than he is obliged to tell—to defeat you, if he can. Undoubtedly there are cases where such a tone is called for; where it is politic as well as just; but they are *rare*, so rare that they should be deemed entirely exceptional. In every part of an Advocate's career, good temper

and self-command are essential qualifications; but in none more so than in the practice of cross-examination. It is marvellous how much may be accomplished with the most difficult witness simply by good humor and a smile; a *tone* of friendliness will often succeed in obtaining a reply which has been obstinately denied to a surly aspect and a threatening or reproachful voice. As a general rule, subject to such very rare exceptions as scarcely to enter into your calculations, you should begin your cross-examination with an encouraging look, and manner, and phrase. Remember that the witness knows you to be *on the other side;* he is prepared to deal with you as an enemy; he anticipates a badgering; he thinks you are going to trip him up, if you can; he has, more or less, girded himself for the strife. It is amusing to mark the instant change in the demeanor of most witnesses, when their own counsel has resumed his seat and the Advocate on the other side rises to cross-examine. The position, the countenance, plainly show what is passing in the mind. Either there is fear, or, more often, defiance. If you look fierce and speak sternly, it is just what had been expected, and you are met by corresponding acts of self-defense. But if, instead of this, you wear a pleasant smile, speak in a kindly tone, use the language of a friendly questioner, appear to give him credit for a desire to tell the whole truth and nothing but the truth, you surprise, you disarm him; it was not what he had anticipated; and he answers frankly your questions.

But where shall you begin? What order shall you follow? Shall you carry him again through the narrative given in his examination-in-chief, or begin at the end of it and go backwards, or dodge him about, now here, now there, without method?

Each of these plans has its advantages, and perhaps each should be adopted, according to circumstances.

NEVER CROSS-EXAMINE WITHOUT AN OBJECT.

But you cannot determine which course to adopt unless you have some definite design in the questions you are about to put. A mere aimless, hap-hazard cross-examination is a fault every Advocate should strenuously guard against. It is far better to say nothing than to risk the consequence of random shots, which may as often wound your friends as your opponents. Very little experience will assure you that there is no error so common as this. Some persons seem to suppose that their credit is concerned in getting up a cross-examination, and they look upon the dismissal of a witness without it as if it were an opportunity lost, and they feared that clients would attribute it, not so much to prudence as to conscious incapacity. So

they rise and put a number of questions that do not concern the issue, and perhaps elicit something more damaging to their own cause than anything the other side has brought out, and the result is, that they leave their client in a far worse condition than before. Let it be a rule with you *never to cross-examine unless to gain some distinct object.* Far better be mute through the whole trial, dismissing every witness without a word, than, for the mere sake of *appearances*, to ply them with questions not the result of *a purpose.*

First resolve whether you will cross-examine at all. It is impossible to prescribe any rules to guide you in this, so much must depend upon the particular circumstances of each case. You must rely upon your own sagacity, on a hasty review of what the witness has said—how his testimony has affected your case, and what probability there is of your weakening what he has said. If he has said nothing material, usually the safer course is to let him go without a question, unless indeed, *you are instructed* that he can give some testimony in your favor or damaging to the party who has called him, and then you should proceed to draw *that* out of him. But unless so *instructed*, you should not, on some mere vague suspicions of your own, or in hope of hitting a blot somewhere by accident, incur the hazard of eliciting something damaging to you,—a result to be seen every day in our courts. So, as a general rule, it is dangerous to cross-examine witnesses called for mere formal proofs, as to prove signatures, attestations, copies and such like. Still, such witnesses are not to be immediately dismissed, for you should first consider if there be any similar parts of your case which they may prove, so as to save a witness to you, and then you should carefully confine yourself to the purpose for which you have detained them.

THREE OBJECTS OF CROSS-EXAMINATION.

In resolving whether or not to cross-examine a witness, it is necessary to remember that there can be but *three* objects in cross-examination. It is designed either to destroy or weaken the force of the evidence the witness has already given *against* you, or to elicit something in your favor, which he has not stated, or to discredit him, by showing to the jury, from his past history or present demeanor, that he is unworthy of belief. Never should you enter upon a cross-examination without having a clear purpose to pursue one or all of these objects. If you have no such purpose, keep quiet.

Let us consider each of these objects of cross-examination separately.

1st. *To destroy or weaken the force of his testimony in favor of the*

other side. If this be your design, you can attain it only by one of two processes. You must show from the witness' own lips, either that what he has stated is *false*, or that it is capable of *explanation.* If your opinion be that he is honest, but prejudiced; that he is mistaken; that he has formed a too hasty judgment, and so forth, your bearing towards him cannot be too gentle, kind and conciliatory. Approach him with a smile, encourage him with a cheering word, assure him that you are satisfied that he intends to tell the truth, and the whole truth, and having thus won his good-will and confidence, proceed slowly, quietly, and in a tone as *conversational* as possible, to your object. Do not approach it too suddenly, or you will chance to frighten him with that which forms the greatest impediment to the discovery of the truth from a witness, *the dread of appearing to contradict himself.* If once this alarm be kindled, it is extremely difficult to procure plain, unequivocal answers. The witness forthwith places himself *on the defensive*, and, deeming you an enemy, fences you with more or less of skill, certainly, but always to the weakening of whatever may drop from him in *your* favor. With *such* a witness, of whose *candor* you are seeking to avail yourself, the better course is to begin with the beginning of the story he has told, and conduct him through it again in the same order, only introducing at the right places the questions which are intended to explain or qualify what he has stated in his examination-in-chief. The advantage of this course is the avoidance of any appearance of a surprise upon him. You take him into his former track—you even make him repeat a portion of what he has before said—you recall his mind to the subject with which it is familiar. The scene is again before him, occupying his thoughts. *Then*, it is easy to try him upon the details (but still gently), to suggest whether it may not have differed by so and so from that which he has described, or if so and so (which gives the transaction another complexion) did not occur also, and thus at more or less length, according to the circumstances of the case.

And here, at the very outset, let us warn you against exhibiting any kind of emotion during cross-examination; especially to avoid the slightest show of exultation when the witness answers to your sagacious touch, and reveals what apparently he intended to conceal. It startles him into self-command and closes the portal of his mind against you more closely than ever. You have put him upon his guard and defeated yourself. Let the most important answer *appear* to be received as calmly and unconsciously as if it were the most trivial of gossip.

In the same manner you may carry him to the conclusion of his

story, and what with an explanation of one fact, and addition to another, and a *toning down* of the color of the whole, the evidence will usually appear in a very different aspect, after a judicious cross-examination, from that which it wore at the close of the examination-in-chief.

Thus you should deal with a witness whom you believe to be truthful, and therefore from whom you propose only to elicit *explanations* and facts in your favor, which the opposite counsel has not, of course, assisted him to disclose.

If you suspect that some of the statements of the witness are *false* in fact, although not willfully mis-stated,—errors of the senses, of the imagination, of the memory,—so much more frequent than they whose occupation has not been to sift and weigh the worth of evidence might suppose,—your task becomes a very difficult one; for without in any manner charging him with perjury, or desiring to have it understood that you do otherwise than believe him to be an honest witness, you have to prevail upon him to confess that which will wear the *aspect* of falsehood. Now, there is nothing upon which witnesses of every grade of rank and intellect are so sensitive as *self-contradiction*. They suspect your purpose instantly, and the dread of being made to appear as lying, while often producing contradictions and evasions, more often arms the resolution of the witness to adhere to his original statement, without qualification or explanation. When, therefore, it is your purpose to show from the witness' own lips that he was *mistaken*, the extremest caution is required in approaching him. You must wear an open brow, and assume a kindly tone. Let there be in your language no sound of suspicion. Intimate to him delicately your confidence that he is desirous of telling the truth and the whole truth. Be careful not to frighten him by point-blank questions going at once to involve him in a contradiction, or he will see your design, and thwart it by a resolute adhesion to his first assertion. You must approach the object under cover, opening with some questions that relate to other matter, and then gradually coming round to the desired point. And even when you have neared the desired point, you must endeavor, by every device your ingenuity can suggest, to avoid the direct question, the answer to which necessarily and obviously involves the contradiction. The safer and surer course is to bring out the discrepancy by inference, that is, instead of seeking to make the witness *unsay* what he has said, it should be your aim to elicit a statement which may be shown by argument to be inconsistent with the former statement.

NEVER SEEK TO ENTRAP WITNESS.

But it must be understood that, in all this, your only purpose should be, to ascertain the very truth—to trace an error, if it exists —to try the memory of the witness, if it be trustworthy. *Never* should you seek to *entrap* him into a *falsehood*, nor, by your art, to throw him into perplexity, with a design to discredit him, if you believe that not only is he honest, but that he has not erred. Your duty as an Advocate is strictly limited by the rules of morality. It is no more permissible for you to tamper with the truth in others, or tempt them to confound or conceal it, than to be false yourself. The art to be practiced in cross-examination is to be used only when you believe that the witness has *not* told the truth, and to elicit the truth is to be your sole purpose.

DIFFICULT TO PROCURE CONTRADICTION.

An *explanation* is less difficult to be procured from a witness than is a contradiction; because in the case of an explanation the witness has not the fear of being presented in the *aspect* of one who is perjured. A witness conscious that he has been induced in the examination-in-chief to say too much, will often seize the opportunity afforded by cross-examination to modify his assertions. If you see this tendency, you have only to encourage it by falling in with his mood, and carefully avoiding anything calculated to make him fear the use to which you may put his admissions. If there be no such tendency, then your course will be the reverse of that to be pursued when you are seeking for contradictions. Instead of avoiding the point, you should go at once to that part of the evidence, repeat the very question, and when you have received the same reply, follow it with a series of questions as to the circumstances, which, as you are instructed, go to modify or explain the statements you are combating. If you are satisfied that the witness is honest and truthful, you cannot put your questions too plainly; let them be as *leading* as you can frame them, naming the fact, and in such a form that the answer shall be a plain "Yes," or "No." And here let us warn you to be cautious not to press your inquiries too far. Having obtained enough for your purpose, pass on. You may obtain too much. There is no more useful faculty in the practice of an Advocate than to know when he has done enough. Many more causes are lost by saying too much than by not saying enough.

SECOND OBJECT OF CROSS-EXAMINATION.

The second object of cross-examination is *to elicit something in your*

favor. The method of doing this depends upon the character of the witness. If you believe him to be honest and truthful, you may proceed directly to the subject-matter of your inquiry, with plain, point-blank questions. But if you suspect that he will not readily state what he is aware will operate in your favor, you must approach him with some of the precautions requisite for the cross-examination of a witness who is not altogether trustworthy. But this distinction in the circumstances is to be observed. Here you are dealing with a witness from whom it is your intent to procure some evidence in your favor. You cannot discredit him, by showing him to be unworthy of belief, without losing the advantage of his testimony on your own behalf. Therefore you cannot venture to probe him by questions that might lead to contradictions. How, then, may you attain your end?

You can only do so by gradual approaches. The plain direct questions which best elicit the truth from the witness desirous of telling the whole truth, and nothing but the truth, would, to a witness who desires to suppress some of the truth, operate as a signal for silence. With such an one the surest course is, by almost imperceptible degrees, to conduct him to the end. Elicit one small fact, perhaps but remotely connected with the main object of your inquiry. He may not see the chain of connection, and will answer *that* question freely; or deem it not worth evading. A very small admission usually requires another to confirm or explain it. Having said so much, the witness cannot stop there; he must go on in self-defense, and thus, by judicious approaches, you bring him to the main point. Even if then he should turn upon you, and say no more, you will have done enough to satisfy the jury that his silence is as significant as would have been his confession.

PROFITING BY WITNESS' SILENCE.

It may be remarked here that good generalship may be often shown in skillfully availing himself of *the silence* of a witness. A refusal to answer, or an evasion of your question, will frequently be more serviceable to you than words. On such occasions, when assured of the advantage with which you can employ in your argument to the jury that reluctance to reply, you will not, after having plied him fairly, continue to urge him; but having done enough to satisfy the Court that he can, if he pleases, say something more, you should withdraw, and then you may suggest such inferences from his silence as may be most advantageous to your cause. It is a frequent and fatal fault of an Advocate to insist on an answer *in words* to *every*

question put, forgetting that the answer may be injurious, while the silence may be more than suggestive of all that is designed to be elicited.

UNFAVORABLE ANSWER OF WITNESS.

The most cautious cross-examination will not always prevent the disagreeable incident of an answer that tells strongly against the questioner. When such a *contre-temps* occurs to *you* do not appear to be taken by surprise. Let neither countenance, nor tone of voice, nor expression of annoyance, show you are conscious of being taken aback. If others exhibit surprise, be you as calm and appear as satisfied as if you had expected the answer in question. Thus you will repel the force of the blow, for, seeing that you are not perplexed by it, the audience may suppose it not to be so important as they deemed it to be, or they give you credit for some profounder purpose than is apparent, or that you are prepared with a contradiction or an explanation. Sometimes, indeed, where the blow has been more than usually staggering, it may not be bad policy to weaken its force by openly making light of it, repeating it, taking a note of it, or appending a joke to it. At no time is self-command more requisite to an Advocate than at such a moment, and never is the contrast between experience, and inexperience, the prudent and the injudicious, more palpably exhibited.

GOVERNING PRINCIPLE IN AN EXAMINATION.

The principle, then, that should govern your conduct in dealing with an adverse witness, with a view to *discredit* him, should be that which you would recognize in your private capacity as a *Christian gentleman*, and which may be summed up in three words—JUSTICE, TRUTH, CHARITY. You have *no right* to tempt, to terrify, or entrap him into falsehood. You have *no right* to charge him with falsehood, unless you are convinced that he is *lying*, and not that he is merely *mistaken*. JUSTICE demands that you deal with him as you would be dealt with were you the witness and he the advocate. TRUTH demands that you make no endeavor to misrepresent him, or to distort the meaning of his words, contrary to your own conviction of his honesty. CHARITY demands that you put upon his evidence the construction most accordant with good *intentions*.

WHEN ART MAY BE USED AGAINST WITNESS.

Only when you are persuaded that the witness is *not* telling the truth, may you with propriety use your art to entrap him into contradictions, or charge him with falsehood. And, indeed, rarely is

any thing to be gained by such prostitution of the abilities of the Advocate as that against which we are warning you. In fact, witnesses do not deliberately *lie* so frequently as the inexperienced are wont to believe. Downright, intended, conscious *perjury*, occurs but seldom.

PERJURY LESS FREQUENT THAN MISTAKE.

But, on the other hand, experience will teach you that evidence is far *less* trustworthy than the public, or juries who represent the public, suppose it to be. There is much *less* of *perjury*, and vastly *more* of *mistake*, in witnesses, than the unaccustomed observer would imagine to be possible, unless he had studied the physiology of the mind, and had thence learned how manifold are the sources of error, and how imperfect is the sense that conveys the knowledge of facts, and the understanding that tries, and proves and applies it.

To the Advocate, however, it is of vital importance that he should attain to the full comprehension of this truth, for it must be the guiding star of his conduct in the cross-examination of witnesses. The consciousness of it will govern his words, his voice, his manner; change the tone of mistrust into that of confidence; the language of rebuke into that of kindness; the eye that flashes anger and kindles defiance into the look that wins to frankness.

WHAT IS MEANT BY DISCREDITING WITNESS.

Do not let us be misunderstood in the use of the phrase, to *discredit* a witness. We do *not* mean by this the vulgar notion of discrediting by making him *appear* to be *perjured*. Our meaning is simply to show, by cross-examination, that his evidence is not to be implicitly believed; that he is mistaken in the whole or in parts of it. By adopting this manner of dealing, you not only act in strict accordance with justice, truth, and charity, but, you are far more likely to attain your object than by charging willful falsehood and perjury, by which course, if you fail to impress the jury, you endanger your cause. It not unfrequently happens that a charge of perjury against the witnesses on the other side, induces the jury to make the trial a question of the honor of the witnesses, instead of the issue on ths record. They say, "If we find for the defendant, after what has been said by his counsel against the plaintiff's witnesses, we shall be confirming his assertion that they are perjured, which we do not believe;" and so, to save the characters of their neighbors, whom they believe to be unjustly impugned, they give a verdict against the assailant.

In truth, without imputing perjury, you will find an ample field for trying the testimony of a witness by cross-examination, and of

showing to the jury its weakness or worthlessness, by bringing into play all that knowledge of the physiology of mind and of the value of evidence which it is presumed that you have acquired in your training for the office of an Advocate. Thus armed, you will experience no difficulty in applying the various tests by which the truth is tried, with much more of command over the witness and vastly more of influence with the jury, who will *always* acknowledge the probability of *mistake* in a witness, when they will not believe him to be *perjured.* And do not adopt this course as if it were an art, a contrivance, but frankly and fully, with entire confidence in its policy as well as its rectitude, so that no lurking doubt may betray itself in your manner, to throw a suspicion on your sincerity.

A sober quietness, an expression of good temper, a certain *friendliness* of look and manner, which will be understood, although it cannot be described, should distinguish you when you commence the cross-examination of a witness, the truth of whose testimony you are going to try, not by the vulgar arts of brow-beating, misrepresenting, insulting, and frightening into contradictions, but by the more fair, more honorable, and more successful, if more difficult, method of showing him to be *mistaken.* You must begin with conciliation; you must remove the fear which the most truthful witness feels when about to be subjected to the ordeal of cross-examination. Let him understand, as soon as possible, that you are *not* about to insult him nor to entrap him into falsehood, nor to take unfair advantages of him; that you have confidence in his desire to tell the truth and all the truth, and that your object is to ascertain the precise limits of truth in the story he has told.

THIRD OBJECT OF CROSS-EXAMINATION.

The *third* object of cross-examination is to *discredit* the witness, and, to accomplish this, proceed very gently, and only, as it were, with the fringe of the case, until you see that the witness is re-assured, and that a good understanding has been established between you, to which a smiling question that elicits a smiling answer will be found materially to contribute. A witness who stubbornly resists every other advance on the part of the Advocate, will often yield at once to a good-humored remark that compels the lips to curl. This point gained, you may at once proceed to your object.

The other purposes of cross-examination have been previously explained. We are now considering only what is to be done when the design is to *discredit* the testimony, not by discrediting *the witness,* but by showing that he is *mistaken;* that he has been *himself*

deceived. Now, the way to do this is by closely inquiring into *the sources of his knowledge;* and here it is that so much analytical skill, so intimate an acquaintance with mind and its operations, is demanded on your part, and that you should avert resistance to your inquiries on the part of the witness.

Perhaps it is unnecessary to inform you that it is useless to put to a witness directly the question, if he is sure that the fact was as he has stated it. He will only be the more positive. No witness will ever admit that he could have been mistaken. This is shown remarkably in cases where personal identity is in question. Every body admits that there is nothing upon which all persons are so often mistaken; yet is there nothing upon which witnesses are more positive, and that positiveness is continually influencing inconsiderate juries to erroneous verdicts, as the records of our criminal law painfully prove; for of the wrongful convictions, fully one half have been cases of mistaken identity, in which witnesses have been too positive, and juries too confiding, in a matter which their own daily experience should satisfy them to be, of all others, the most dubious and unsatisfactory. Instead, therefore, of asking the witness whether he might not be mistaken, you should proceed at once to discover the probabilities of mistake, by tracing the sources of his knowledge, and by eliciting all the circumstances, internal and external, under which it was formed. It is in this operation that the faculties of the skillful Advocate are displayed; this it is that calls into play his acquaintance with mental physiology, his experience of men and things, and in which he exhibits his superiority over the imperfectly educated and the inexperienced.

HOW TO SHOW WITNESS IS MISTAKEN.

By what process do you perform this difficult duty, and achieve this triumph of your art? Let us endeavor to describe it.

The witness has detailed an occurrence at a certain time and place, and it is your purpose to show that he was mistaken in some of the particulars, and that the inferences he drew from them were incorrect, or not justified by the facts. Your first proceeding to this end, is to *realize the scene* in your own mind. Your fancy must paint for you a picture of the place, the persons, the accessories. You then ask the witness to repeat his story—you note its congruity or otherwise with the circumstances that accompanied it; you detect improbabilities or impossibilities. You see as he saw, and you learn in what particulars he saw imperfectly, and how he formed too hasty conclusions; how prejudice may have influenced him; how

things dimly seen were by the imagination transformed into other things in his memory.

How erring the senses are, and how much their impressions are afterward moulded by the mind; how very fallible is information, seemingly the most assured, it needs no extensive observation to teach. If you make inquiry as to an occurrence in the next street, ten minutes after it has happened, and from half a dozen actual spectators of it, you will receive as many different accounts of its details, and yet each one positive as to the truth of his own narrative, and the error of his neighbor's. It is so with *all* testimony; and hence, whatever depends upon the senses or the momory of a witness, however honest and truth-speaking he may be in intention, is fairly open to doubt, to question, to investigation, and to denial, for the purpose of showing that it ought not to be relied upon, and that it may have, upon the question under consideration, a bearing altogether different from that for which it was employed by the party who adduced it.

TO DISCOVER SOURCE OF WITNESS' MISTAKE.

But it is not enough to ascertain that the witness is mistaken; to satisfy the jury, when you come to comment upon his evidence, you must learn whence the mistake arose, and you should not leave him until you have attained your object. Sometimes you may procure this from the witness' mouth, thus:—Having gathered from his description that, in the circumstances of place or time, or otherwise, as the case may be, it was impossible or improbable that he could have seen or heard enough to justify his positive conclusion, you may plainly put to him the question, how it is that, being so situated, he could have so seen or heard? This will usually elicit an explanation that will at once be a confession of his mistake and a discovery of its cause.

Caution is nevertheless necessary in this proceeding, and it should be resorted to only when other means have failed; for, having ascertained to your own satisfaction the mistakes of the witness and the facts that prove them to be mistakes, the exhibition of them will come with far better effect in your address to the jury, when lucidly displayed in argument, than when evolved bit by bit in the course of a long examination. Usually, it will be sufficient for you that you have the *fact*. Besides, it is well that the witness himself is not made conscious of detected error, lest, fearing to have his veracity impugned, he should close his mind against you, and resist further investigation into the parts of his story which yet remain to be told.

DEALING WITH FALSE WITNESS.

The art of cross-examination, however, is not limited to the detection of *mistakes* in a witness. Sometimes it happens that you have good reason to believe that he is not mistaken, but that he is *lying;* and when you are assured of this, but not otherwise, you may treat him as a liar, and deal with him accordingly. Your object will now be to prove him to be a liar out of his own mouth, and it will be permissible to resort to many a stratagem for the purpose of detection, which might not be fairly used towards a witness whom you believe to be honest, but mistaken.

The question occurs whether it is more prudent to show such a witness that you suspect him, or to conceal your doubts of his honesty? Either course has its advantages and disadvantages. By displaying your doubts, you incur the risk of setting him upon his guard, and leading him to be more positive in his assertions and more circumspect in his answers; but, on the other hand, a conscious liar is almost always a moral coward; when he sees that he is detected, he can rarely muster courage to do more than reiterate his assertion; he has not the presence of mind to carry out the story by ingenious invention of details, and a consistent narrative of accidental circumstances connected with it. A cautious concealment of your suspicions possesses the advantage of enabling you to conduct him into a labyrinth before he is aware of your design, and so to expose his falsehood by self-contradictions and absurdities. Perhaps either course might be adopted, according to the character of the witness. If he is a cool, shrewd fellow, it may be more prudent to conceal from him your doubts of his veracity, until he has furnished you with the proof. If he is one of that numerous class who have merely got up a story to which they doggedly adhere, it may be wise to awe him at once, by notice that you do not believe him, and that you do not intend to spare him. We have often seen such a witness surrender at discretion on the first intimation of such an ordeal. This is one of the arts of advocacy which cannot be taught by anything but experience. It is to be learned only by the language of the eye, the countenance, the tones of the voice, that betray to the practiced observer what is passing in the mind within.

But having resolved upon your course, pursue it resolutely. Be not deterred by finding your attacks parried at first. Persevere until you have attained your object, or are convinced that your impression was wrong, and that the witness is telling the truth. If you determine to adopt the course of hiding from him your doubts, be careful not to betray doubt by your face nor by tone of voice. A good Advocate is

a good actor, and it is one of the faculties of an actor to command his countenance. Open gently, mildly; do not *appear* to doubt the witness; go at once to the marrow of the story he has told, as if you were not afraid of it; make him repeat it; then carry him away to some distant and collateral topic, and try his memory upon *that*, so as to divert his thoughts from the main object of your inquiry, and prevent his seeing the connection between the tale he has told and the questions you are about to put to him. Then, by slow approaches, bring him back to the main circumstances, by the investigation of which it is that you purpose to show the falsity of the story.

The design of this manœuvre is, of course, to prevent him from seeing the connection between his own story and your examination, so that he may not draw upon his imagination for explanations consistent with his original evidence; your design being to elicit inconsistency and contradictions between the story itself and other circumstances, from which it may be concluded that it is a fabrication.

INSTANCE OF DETECTION OF FALSE WITNESS.

As a specimen of the sort of cross-examination to which we refer: In a case of affiliation of a bastard child, the mother had sworn distinctly and positively to the person of the father, and to the time and place of their acquaintance, fixed, as usual, at precisely the proper period before the birth of the child. In this case, the time sworn to was *the middle of May;* and the place, the putative father's garden; for an hour the witness endured the strictest cross-examination that ingenuity could suggest; she was not to be shaken in any material part of her story: she had learned it well, and with the persistence that makes women such difficult witnesses to defeat, she adhered to it. She was not to be thrown off her guard by a question for which she was not prepared, and the examination proceeded thus:—"You say you walked in the garden with Mr. M.? Yes. Before your connection with him? Yes. More than once? Yes; several times. Did you do so afterwards? No. Never once? No. Is there fruit in the garden? Yes. I suppose you were not allowed to pick any? Oh! yes; he used to give me some. What fruit? Currants and raspberries. Ripe? Yes."

This was enough. She was detected at once. The alleged intercourse was in the middle of May. Currants and raspberries are not ripe till June. In this case the woman's whole story was untrue. She had fallen in with the suggestion about fruit, to strengthen, as she thought, her account of the garden. But she did not perceive the drift of the questions, and consequently had not sufficient self-command to reflect that the fruit named was not ripe in May.

This will serve as an illustration of the manner in which the most acute witness may be detected in a lie. But patience in the pursuit is always necessary. You may be baffled once and again, but be careful never to let it be seen that you are baffled. Glide quietly into another track, and try another approach; you can scarcely fail of success at last. No *false* witness is armed at *all* points.

But, in this process, somewhat tedious, it is true, to yourself, and not always comprehended by others, the art of the witness will not be the only nor the severest trial of your temper. Too often you will find the Judge complaining of the tediousness of repetition. He does not always see your drift, and, especially, if you are young, he is apt to conclude that you are putting questions at random, and to refuse you credit for a meaning and a design in your queries. You must, in such case, firmly but respectfully assert your right to conduct your examination after your own fashion, and proceed, without perturbation, in the path your deliberate judgment has prescribed. Your duty is to your client, and you must discharge it fearlessly, leaving to the event and to experience to vindicate your motives and prove the wisdom of your conduct. After a while the Judge will discover that you do not act without a sufficient reason, and that you have a design in your cross-examination. It must, however, be confessed that cross-examination is so often conducted at random, without aim, or plan or purpose, as if for the mere sake of saying something, that Judges may well be excused for suspecting a divergent course in a junior, and attributing to inexperience a string of questions which are in fact the result of profound deliberation and design.

OPEN ATTACK UPON WITNESS.

If, however, you adopt the other course, and, instead of surprising the witness into the betrayal of his falsehood, you resolve to bring it out of him by a bold and open attack—to *awe* him, as it were, into honesty—aspect and voice must express your consciousness of his perjury, and your resolve to have the truth. A stern, determined fixing of your eye upon his, will often suffice to unnerve him, and it will certainly help you to assure yourself whether your suspicions are just or unjust. It may be stated, as a general rule, that a witness who is lying will not look you fully in the face, with a steady gaze; his eye quivers and turns away; is cast down, and wanders restlessly about. On the contrary, the witness who is speaking the truth, or what *he believes* to be the truth, will meet your gaze, however timidly; will look at you when he answers your questions, and

will let you look into his eyes. There may be exceptions to this rule, but it rarely fails to inform the Advocate whether the person subject to cross-examination is the witness of truth or of falsehood.

Thus assured, and pursuing your plan of bold attack, there needs to be no circumlocution, no gradual approaching, as in the other method of surprisal, but go straightway to your object, plunging the witness at once into the story you are questioning. Make him repeat it slowly. It will often be that, under the discomposure of your detection of his purpose, he will directly vary from his former statement, and if he does so in material points, which are sufficient to discredit him, it will usually be the more prudent course to leave him there, self-condemned, instead of continuing the examination, lest you should give him time to rally, and perhaps contrive a story that will explain away his contradictions. If, however, his lesson is well learned, and he repeats the narrative very nearly as at first, you will have to try another course, which will tax your ingenuity and patience.

Procure from him in detail, and let *his words* be taken down, the particulars of his story, and then question him as to associated circumstances as to which he is not likely to have prepared himself, and to answer which, therefore, he must draw on his invention at the instant. Some ingenuity will be necessary on your part, after surveying his story, to select the *weakest* points for your experiment, and to suggest the circumstances least likely to have been pre-arranged. Having obtained his answers, permit him no pause, but instantly take him to a new subject; lead his thoughts away altogether from the matter of your main topic. The more irrelevant your queries the better; your purpose is to occupy his mind with a new train of ideas. Conduct him to different places and persons and events. Then, as suddenly, in the very midst of your questionings, when his mind is the most remote from the subject, when he is expecting the next question to relate to the one that has gone before, *suddenly* return to your first point, not repeating the *main* story, for this, having been well learned, will probably be repeated as before, but to those circumstances associated with it upon which you had surprised him into *invention* on the moment. It is probable that, after such a diversion of his thoughts, he will have forgotten what his answers were, what were the fictions with which he had filled up the accessories of his false narrative, and having no leisure allowed to him for reflection, he will now give a different account of them, and so betray his falsehood. Of all the arts of cross-examination, there is none so efficient as this for the detection of a lie.

Another excellent plan is to take the witness through his story,

but not in the same order of incidents in which he told it. Dislocate his train of ideas, and you put him out; you disturb his memory of his lesson. Thus begin your cross-examination at the middle of his narrative, then jump to one end, then to some other part the most remote from the subject of the previous question. If he is telling the truth, this will not confuse him, because he speaks from impressions upon his mind; but if he is lying, he will be perplexed and will betray himself, for, speaking from the memory only, which acts by association, you disturb that association, and his invention breaks down.

When you are satisfied that the witness is drawing upon his invention, there is no more certain process of detection than a *rapid fire* of questions. Give him no pause between them; no breathing place, nor point to rally. Few minds are sufficiently self-possessed as, under such a catechising, to maintain a consistent story. If there be a pause or a hesitation in the answer, you thereby lay bare the falsehood. The witness is conscious that he dares not to stop to think whether the answer he is about to give will be consistent with the answers already given, and he is betrayed by his contradictions. In this process it necessary to fix him to *time*, and *place* and *names*. "You heard him say so?" "When?" "Where?" "Who was present?" "Name them." "Name one of them." Such a string of questions, following one upon the other as fast as the answer is given, will frequently confound the most audacious. Fit names, and times and places, are not readily invented, or if invented, not readily remembered. Nor does the objection apply to this, that may undoubtedly be urged against some others of the arts by which an Advocate detects falsehood, namely, that it is liable to perplex the innocent, as well as to confound the guilty; for if the tale be true, the answers to such questions present themselves instantaneously to the witness' lips. They are so associated in his mind with the main fact to which he is speaking, that it is impossible to recall the one without the other. Collateral circumstances may be forgotten by the most truthful, or even be unobserved; but time, place and audience are a part of the transaction, without which, memory of the fact itself can scarcely exist.

DISCREPANCIES AND DIFFERENCES IN TESTIMONY.

There is no branch of our subject on which a wider difference of opinion prevails than upon the weight to be given to variations by a witness in the telling of a story—counsel usually dwelling upon them as evidences of falsehood, and judges almost always directing the jury that they are rather evidences of honesty. It may be useful, in this place, to endeavor to reconcile these opposite conclusions of intelligent minds.

Memory is association; ideas return linked together as they were originally presented to the mind, and the presence of one summons the other by suggestion. An event is witnessed, and the scene and its accessories are impressed upon the mind. But it is only impressed there *as the spectator beheld it*, and not necessarily as it was in reality. It is necessary to ascertain also the *medium* through which he saw or heard, before we can properly estimate the value of his memory. When called upon to bear testimony to the fact, if he desires to tell the truth, he will describe, as nearly as he can in words, so much as he can recall of the circumstances. But it by no means follows, that, every time he recalls the scene, it should present itself to his mind in precisely the same aspect; and for this reason, the mind does not revive the whole at once, but in succession, and some portions of it will come back more vividly at one time than at another, and, by their very vividness, recall other associations before unremembered. Hence, *differences* in description, and especially new circumstances introduced into a repeated narrative, although each repetition should *vary* from all the former ones, by the addition of some things, and the omission of others, do not afford the slightest grounds for imputing perjury to a witness. On the contrary, they are rather a presumption in his favor, for an invention that is learned would probably be recalled *as it was learned*, with the same facts, and almost in the same words.

But it is otherwise with *discrepancies* of statement. These *cannot* exist in a truthful narrrative. Repeated never so frequently, and whatever the *variance* in detail, the story will always be consistent with itself, and with its former assertions. A positive discrepancy is proof that whatever the cause, whether by design or by the not unfrequent delusion of mistaking imagination for reality, the witness is not speaking the truth, and therefore in such a case, be the motive what it may, an Advocate is justified in pointing out this discrepancy to the jury, and asserting that no faith can be placed in a narrative which thus contains within itself decisive evidence that some portion of it, at least, is not true. By bearing in mind the distinction between *variances* and *discrepancies* in the repetitions by a witness in the same story, the Judge and the Advocate may avoid those contradictions of assertion as to the worth of certain testimony, which sometimes shake the confidence of juries in arguments really deserving their consideration, and which are equally disagreeable to the speaker and to the commentator. Let the Advocate abstain from dwelling upon mere *variances*, and let the Judge, before he directs the jury the Advocate is wrong in his assertions, as cautiously assure himself that the objections that have been urged are not to *discrepancies* but to *differences*.

REPETITION OF QUESTIONS.

We have already noticed the difficulty sometimes experienced by an Advocate, from the impatience of the Judge at repetitions of the same questions. Too often he is met with the remark, "Mr.——, you have asked that question before," or, "The witness has already told you." This is doubly disagreeable, for besides putting you on ill terms with the Court, it disturbs your plans, and sets the witness on his guard. There is nothing of which the Bench is so little tolerant as of the repetition of the same question, and yet there are few more effective methods of detecting a falsehood. The witness answers. You note his answer. You pass away to some distant part of the story, or some foreign transaction. You then on a sudden return, when his thoughts have been otherwise engaged, when probably he has forgotten his first answer, if it was false, and you obtain a different one, which instantly betrays him. Often we have seen witnesses proof against all other tests fail before this one. When your design is distinctly this, and not merely a vague, purposeless interrogation, proceed respectfully but firmly to show that you have a meaning, and your aims will soon come to be understood and respected by the Court.

ADJURATION TO WITNESS.

Do not indulge too much in adjurations to witnesses to speak the truth, reminding them continually that they are on their oaths, as "Now, Sir, upon your solemn oath;" "Remember, you are upon oath, and take care what you say," and such like. If frequently introduced, they lose their force by repetition. They are very effective when judiciously employed, and uttered with due solemnity of tone and manner, and on fit occasions; but they should not be put forward on every slight pretense, as well to frighten an honest as to awe a dishonest witness. Reserve such an appeal for times when it may be used with effect, because with obvious propriety. When you believe that a witness is tampering with his conscience you may sometimes successfully prevent the contemplated perjury by a solemn appeal, and especially if you add to it an exhortation not to be hasty in his answer, but to think before he speaks. The countenance, the tone of the voice, the very attitude, should express the language you utter. You may word it somewhat after this fashion: "Remember, you have sworn to tell the truth and the whole truth. Now [put the question, and add] think before you speak, and answer me truly as you have called God to witness your words." It is one of the faults common to young Advocates, that they make too free an use of this appeal to witnesses, wasting its worth by familiarity.

WITNESS NOT REMEMBERING.

Sometimes a witness *will not* answer. He does not choose to know. He will not remember. He is obstinately ignorant. You are aware that he *could* tell you a great deal, if he pleased, but he has reasons for forgetting. Such a witness will task your skill and patience. To conquer him you will need as much of patience as of art. The first rule is, to keep your temper; the second, to be as resolute as himself; the third, to discover his weak place: every person *has* some weak point, through which he is accessible. If you betray the slightest want of temper, the witness will have the advantage of you, for you will enlist his pride in defense of his determination. If you show him that you are resolved to have an answer, you will shake him by the influence which a strong will always obtains over a weaker one, and by that wonderful power which persistency never fails to exercise. To find out his weaknesses, you must peruse his character by the art which it is assumed you have cultivated—of reading the mind in the face. Then work him accordingly. The surest method is the smiling and jocose. Many a man who will withstand unmoved a torrent of abuse, or rather become more obstinate under its influence, will surrender to a smiling face and a good-humored joke. If these fail, there yet remains another resource, more difficult of appliance, and demanding the most consummate mastery of the art of cross-examination. You must now approach him by stratagem. Your object is to procure him to admit so much that he cannot help telling you the whole story. The difficulty of this consists in the extreme caution required to approach him so that your object shall not be perceptible to him; so to frame your questions that he shall not see the connection between the answer he is about to give and the confession you desire to abstract from him. In appearance the questions must be dissevered from the immediate subject sought, but, in fact, they must be associated with it. The approach must be so gradually made as not to excite suspicion; and perhaps it is well to open with something quite foreign to the subject-matter. Having obtained an answer, you put another query that appears naturally to follow from the former, and so on, until you link with the question something that is associated with the matter sought for. It is not easy for a witness to discover the links of such a chain, and he is sure to make some admissions that negative his alleged ignorance of the transaction, and compel him, having yielded so much, to surrender the whole.

UNIMPORTANT DISCREPANCIES.

Avoid the fault of seizing upon *small* and *unimportant* discrepancies. Experience teaches us that there are few who can tell the same story twice in precisely the same way, but they will add or omit something, and even vary in the description of minute particulars. Indeed, a *verbatim* recital of the same tale by a witness is usually taken as proof that he is repeating a lesson rather than narrating facts seen. A discrepancy, to be of any value in discrediting a witness, must be in some particular which, according to common experience, a man is not likely to have observed so slightly as that he would give two different descriptions of it. Remember you are dealing with a jury composed of men who cannot understand refined distinctions, and have no respect for petty artifices and small triumphs over a witness' self-possession or memory, and that you will not win their verdict unless you show that the witness is not puzzled, but lying.

WITNESS VOLUNTEERING TESTIMONY.

When a witness, upon his examination-in-chief, anticipates the counsel, and, instead of waiting to be questioned, or after two or three questions have been put to him, proceeds to tell his whole story, and will go on in spite of every effort made to stop him, observe him closely, to ascertain from his manner whether he is telling the truth, or merely repeating a lesson learned by heart.

If satisfied that the witness is lying, you may, in your cross-examination, endeavor to discredit him with the jury. Your attack may be most successfully conducted thus: Without previous questioning come at once to the point, and ask him to repeat his account of the transaction. He will do so in almost the self-same words, with the same aspect and manner, and in the same tone, differing palpably from his bearing, and tone, and language, before and after the episode. So certain is this test that, if it fails, you may fairly suppose that whatever other objections may be offered to the testimony, it is not a story repeated by rote.

EXAMINATION OF PARTY TO SUIT.

In the examination-in-chief you need observe no difference of conduct toward *a party* to the suit and any other witness, excepting, perhaps, a little care to *rein him in* if he should appear to be too eager. But, in cross-examination, you must take into account the fact that a party has a strong bias of interest which *may* tempt him to tell a deliberate lie, but which is much *more likely* to color his

impressions, and produce *self*-deception. So that he may have the most confident belief in the truth of that which he is stating, and yet it may be false in fact. Therefore, where a party to the suit is a witness, you should subject him to the most rigid cross-examination, to test his accuracy. The manner of doing this will vary somewhat from that which has been suggested as applicable to other classes of witnesses.

You may *assume* the existence of a strong prejudice and bias, but not, therefore, necessarily of an *intention* to deceive. Great caution will be required in dealing with him. You will have occasion to employ by turns all the tests of truth that have been already described.

If the witness is manifestly desirous of speaking the truth, your course is clear. Let him see that such is your opinion of him. Encourage his honest intents by frank acknowledgments. If the examination-in-chief has brought out only a portion of the facts, it will be your business to supply the deficiencies and elicit the whole story. No ingenuity will be required for this with such a witness. You may advance directly to your object. He will give straightforward answers to your questions, and the more plain they are the more ready and full will be his replies. But such a witness is the most dangerous one to you. The same honesty which enables you to obtain a ready answer to your questions, and to elicit every circumstance connected with the transaction, will carry conviction to the jury also, and his testimony will be received with unhesitating confidence. If, therefore, you do not expect to obtain from him some facts which may weaken your opponent's case, it will be more prudent not to cross-examine him at all, or only to put a few questions that have no bearing on the case, merely that you may not appear to have abandoned your cause. The more truthful he is, the more likely it is that every answer you will obtain will make his case the stronger, and damage your case the more.

But if you see that the witness is *biased*, you must employ some artifice. Direct questions will not suffice. You must approach him with caution, and indirectly. Begin by giving him credit for *good intentions*. Do not *appear* to mistrust him. Flatter him even with the assurance that you believe he *desires* to tell the whole truth. It is a great point to have him pleased with himself, for your purpose is, not only to unveil him to others, but to strip from his own eyes the veil of *self*-deception, so that his vanity will be enlisted against you. Remind him, by your first question, that he is a party to the cause, and has the strongest interest in the result. Follow it with

the assurance of your own confidence, that, in spite of this bias, he *desires* to tell the whole truth; but, although he has no intent to deceive, the truth is not as he has stated; misled by his feelings or his interests, he has seen the truth only partially, or distorted, or falsely colored. Your duty is either to elicit the very truth as it was, or to show that, being thus self-deceived, his testimony is not to be relied upon. It is obvious that direct questioning will fail to effect this, for to a mere repetition of the question as to what he saw or heard, the same answer as before will be given. The only means of shaking such testimony is to show it to be inconsistent with other facts, or with those strong probabilities arising out of the usual order of things, the ready perception of which constitutes what is called *common sense*. It is in eliciting this inconsistency either with the rest of the story, or with the common sense of mankind, of which a jury is generally a pretty fair representative, that the skill and ingenuity, aided by the experience of an Advocate, is demanded.

There is no difference in this respect in the cross-examination of a party, and that of any other interested witness. In both instances the process will be the same; to approach him by *indirect* and *not* by direct questions, and to employ all your efforts to elicit contradictions and inconsistencies between the facts positively asserted by the witness and other undoubted facts, or between his testimony and probability and common sense; from which you may argue that no reliance can be placed upon the evidence, not because the witness has been guilty of perjury, or intends to deceive, but because he has fallen into error. This is an argument which rarely fails to convince, because it is in accordance with experience, and is infinitely more effective than one, which imputes every mistake or misstatement to deliberate falsehood.

In dealing with a *party* to the suit as a witness, you have this advantage, that his testimony will be watched with more strictness, and subjected to a severer scrutiny, than would the evidence of an unbiased witness.

REPEATING QUESTIONS ASKED ON DIRECT EXAMINATION.

A witness having already echoed the questions of his own counsel, and proved his own case, and being well prepared with that, he will of course repeat the lesson he has learned, without alteration or hesitation, and the more positively the more you press him; therefore it is a waste of time and helping him more than yourself to repeat those self-same questions. Yet how often is this done. With a slight alteration of phrase and an attempt to be stern, counsel sometimes

persist in repeating the very question which the witness has already distinctly answered. "Do you mean to tell the jury upon your oath that you heard him say so?" "Will you swear you saw Smith strike him?" and such like; to which the answer is, "I have said so already," "I *have* sworn it." No other answer could be expected. The witness had come prepared to prove these very facts; and, although false, having once sworn to them he can not do otherwise than restate them, however frequently the question may be repeated. This manner of proceeding is, therefore, worse than worthless, and you will at once direct your efforts to the eliciting of *contradictions*—by which we do not mean trifling differences of phrase, or discrepancies in small matters, which the witness is not likely to have observed very accurately, and on which, therefore, his story might vary upon every repetition, without any intentional falsehood, but unquestionable contradictions of statements, so obvious that the witness *could* not have believed both to be true. If he is lying, no presence of mind or ingenuity will enable him to escape from your pursuit, provided you conduct it with proper skill, giving him no time for reflection, and so engaging his attention that he shall not have leisure to digest his answers, or to see how they square with the story he has already told.

THE TRUTH ALWAYS CONSISTENT WITH ITSELF.

The principle of this manner of cross-examination is, that truth is always consistent with itself. If the witness is telling the truth, his answers will be in substantial accordance with the story he has already told, and with any questions that may be put to him. He has no need to consider their bearing, and therefore his reply is as prompt as memory. On the contrary, a witness who is telling a false story can rarely so construct it that it shall be consistent with other associated circumstances which it is impossible to anticipate.

Hence it is that you must try the witness by questions on matters which only bear indirectly upon the point at issue. As, for instance, if he have sworn that on a certain day a certain person made to him a certain statement. You cannot directly shake *the fact* thus sworn to, for the witness has but to adhere to his assertion and he will baffle any amount of direct interrogation. But it is not at all likely that he has prepared himself with all the accompanying particulars; therefore you put such questions as these: Where was the conversation held? At what time of the day? Who was present? Were they sitting or standing? How did he come to the place? Whom did he meet on the way? How was he dressed—and the other party? Did

they speak loud or low? Did they eat or drink together, and what? Did any body come in while they were talking? How long were they together? When they parted which way did each take? Whom did he meet afterward? At what time did he reach his home? and so forth, as the particular circumstances of the case may suggest, but always, if possible, preferring facts spoken to by other witnesses, so that you may expose him, not only by his self-contradictions, but by the testimony of others. When questions of this kind are rapidly put, they deprive the false witness of opportunity to fit them to his previous story. You should also carefully avoid putting them in any natural sequence of time or place, for that is to suggest to him a story which he will invent quite as rapidly as you can construct your questions. Dislocate them as much as possible. Take now one part of the story, then another. Dodge him backward and forward, from one object to the other, so that it shall be impossible for him to be prepared by one question for the next, or that one answer shall be the prompter of its successor. The difficulty of doing this well is very great, and therefore, perhaps, it is that it is so rarely seen to be well done; but it is an accomplishment wanting which the Advocate is not a master of his art.

FACTS OCCURRING IN PRESENCE OF WITNESSES ONLY.

There is one kind of testimony which will sometimes baffle the utmost skill. It is the case of a witness who swears positively to some single fact, occurring when no other person was present, or but one now dead or far distant, and whom, therefore, it is impossible to contradict, and equally difficult to involve in self-contradiction, because all the circumstances may be true, except the one which he has been called to prove.

In such a case, there remains only an appeal to the jury or judge to look with suspicion upon evidence so easily forged, so impossible to be disproved, and ask that its worth be tried by its intrinsic probabilities, showing, if you can, how improbable it is that such a statement should have been so made, or such a circumstance have occurred.

THE RE-EXAMINATION.

The object of re-examination is simply to obtain from the witness *an explanation* of that which he had said in cross-examination. The necessity for giving a witness such an opportunity proceeds from the system of eliciting evidence by means of questions. A witness does

not tell his story without interruption, but he is required to answer the questions of counsel, and seldom permitted to do more, or to accompany his answer with an explanation. A skillful advocate, in his cross-examination, avails himself of this to obtain such answers only as suit his purpose, excluding the explanations that might give them another meaning. It is the duty of the advocate on the other side to note such replies, and on re-examination to give to his witness the opportunity for explanation before denied to him. Hence the necessity for keeping an observant eye upon your witness while he is under cross-examination, so that you may discover any desire he may exhibit to give an explanation of an answer, or to add something that might modify its apparent import. Be especially careful to note all such upon your brief; also any answers that appear to be damaging, so that, upon re-examination, you may not leave any one unexplained. Experience will teach you by what signs a witness will indicate a desire to explain what he has said. If the witness exhibits no desire to explain, it is a dangerous duty to try if he *can* explain.

NO NEW MATTER ON RE-EXAMINATION.

It is a rule that you shall strictly confine yourself, in the re-examination, to matters that have been mooted in the cross-examination. You are *not* permitted to go into *new* matter. This is the only restriction, for, if the subject has been touched upon, however slightly, by your adversary, you are entitled to go fully into it; and hence it is that a skillful advocate is commonly enabled to make good use of the re-examination, for a cross-examination rarely omits to deal more or less with all the most important portions of a witness' testimony. Avoid seeking explanations where none can be given, for thus you injure your case by recalling the damaging answer and making it doubly impressive by reiteration.

By a skillful use of the opportunities offered by the cross-examination, you may elicit a repetition of the most important parts of the evidence-in-chief, as a set-off against any unfavorable testimony extracted by the cross-examination.

RESTORATION OF WITNESSES.

The business of re-examination is the *restoration* of your witness to the confidence of himself and of the jury. It frequently occurs that a witness has been terrified and confused by the cross-examination, even to the loss of memory, or, which is even more dangerous, to the producing in him of an aspect and manner that might be mistaken for conscious guilt. If, therefore, you detect in him any signs

of dissatisfaction with himself, your first care will be to revive his self-possession. To one sincerely desirous of telling the truth, no position is more painful than that into which he is sometimes betrayed by seeming contradictions, elicited in the course of an ingenious cross-examination, producing upon the audience the visible impression that he has been lying. In such circumstances it is difficult to be discreet and to preserve the temper unruffled. Let your first care be given to this. The witness burns for an opportunity to explain himself; it will be yours to give it to him, but not in the hasty manner in which his feelings prompt him to deliver it, but in fit reason and form, as suits your discreeter purpose. Prevent this natural outburst by questions that will show your sympathy and assure him of your aid to set him right. Soothe his irritation by your words and aspect. When he is restored to himself, take him quietly through his story. Bring out, as far as you can, the *strong points* of his testimony, which has not been shaken on the cross-examination. When you come to some doubtful matter, on which the cross-examination has damaged your witness, pass it by unnoticed unless satisfied that the witness can satisfactorily explain it.

CONCLUSION.

In conclusion we reiterate the caution, so often repeated, never to put a question to a witness without an aim, nor except you expect to derive some positive advantage from it. Leave a bad matter untouched, unless you are *sure* that you can make it better. Where you cannot do good, you are almost certain to do harm. The Advocate's art may be shown equally in *silence* as in *speaking*.

THEORIES AND FACTS.

General experiential truths, such as we have just spoken of, are called *Theories*, and the particular observations from which they are collected, and which they include and explain, are called *Facts*. Thus Hipparchus' doctrine, that the sun moves in an eccentric about the earth, is *his theory* of the sun, or the *Eccentric theory*. The doctrine of Kepler, that the earth moves in an ellipse about the sun, is *Kepler's theory* of the earth, the *Elliptic theory*. Newton's doctrine that this elliptical motion of the earth about the sun is produced and governed by the sun's attraction upon the earth, is the *Newtonian theory*, the *Theory of Attraction*. Each of these theories was accepted, because it included, connected, and explained the facts; the facts being, in the two former cases, the motions of the sun as observed; and in the other case, the elliptical motion of the earth as known by Kepler's theory. This antithesis of *Theory* and *Fact* is included in what has just been said of inductive propositions. A theory is an inductive proposition, and the facts are the particular observations from which, as I have said, such propositions are inferred by induction. The antithesis of theory and fact implies the fundamental antithesis of thoughts and things; for a theory (that is, a true theory) may be described as a thought which is contemplated distinct from things and seen to agree with them; while a fact is a combination of our thoughts with things in so complete agreement that we do not regard them as separate.

Thus the antithesis of theory and fact involves the antithesis of thoughts and things, but is not identical with it. Facts involve thoughts, for we know facts only by thinking about them. The fact that the year consists of three hundred and sixty-five days, the fact that the month consists of thirty days, cannot be known to us, except we have the thoughts of time, number, and recurrence. But these thoughts are so familiar, that we have the fact in our mind as a simple thing without attending to the thoughts which it involves. When we mold our thoughts into a theory, we consider the thought as distinct from the facts; but yet, though distinct, not independent of them; for it is a true theory only by including and agreeing with

the facts (*Whewell's History of Scientific Ideas*, vol. i. bk. i. part i. ch. i. s. 4). We have spoken of the common opposition of theory and fact as important, and as involving what we have called the fundamental antithesis of philosophy. But after all, it may be asked, is this distinction of theory and fact really tenable? Is it not often difficult to say whether a special part of our knowledge is a fact or a theory? Is it a fact or a theory that the stars revolve round the pole? Is it a fact or a theory that the earth is a globe revolving on its axis? Is it a fact or a theory that the earth travels in an ellipse round the sun? Is it a fact or a theory that the sun attracts the earth? Is it a fact or a theory that the lodestone attracts the needle? In all these cases, probably, some persons would answer one way, and some persons the other. There are many persons by whom the doctrine of the globular form of the earth, the doctrine of the earth's elliptical orbit, the doctrine of the sun's attraction on the earth, would be called *theories*, even if they allowed them to be true theories. But yet, if each of these propositions be true, is it not a *fact?* And even with regard to the simpler facts, as the motion of the stars round the pole, although this may be a fact to one who has watched and measured the motions of the stars, one who has not done this, and who has only carelessly looked at these stars from time to time, may naturally speak of the circles which the astronomer makes them describe as theories. It would seem, then, that we cannot in such cases expect general assent if we say, *This is a fact and not a theory*, or *This is a theory and not a fact.* And the same is true in a vast range of cases. It would seem, therefore, that we cannot rest any reasoning upon this distinction of theory and fact; and we cannot avoid asking whether there is any real distinction in this antithesis, and if so, what it is.

To this I reply, the distinction between theory (that is, true theory) and fact, is this: that in theory the ideas are considered as distinct from the facts; in facts, though ideas may be involved, they are not, in our apprehension, separated from the sensations. In a fact, the ideas are applied so readily and familiarly, and incorporated with the sensations so entirely, that we do not see *them*, we see *through them.* A person who carefully notes the motion of a star all night sees the circle which it describes, as he sees the stars, though the circle is, really, a result of his own ideas. A person who has in his mind the measures of different lines and countries on the earth's surface, and who can put them together into one conception, finds that they can make no figure but a globular one; to him, the earth's globular form is a fact, as much as the square form of his chamber. A person to

whom the grounds of believing the earth to travel round the sun are as familiar as the grounds for believing the movements of the mail-coaches in this country looks upon the former event as a fact, just as he looks upon the latter events as facts. And a person who, knowing the fact of the earth's annual motion, refers it distinctly to its mechanical cause, conceives the sun's attraction as a fact, just as he conceives as a fact the action of the wind which turns the sails of a mill. He cannot *see* the force in either case; he supplies it out of his own ideas. And thus, a true theory is a fact; a fact is a familiar theory. That which is a fact under one aspect is a theory under another. The most recondite theories, when firmly established, are facts; the simplest facts involve something of the nature of a theory. Theory and fact correspond, in a certain degree, with ideas and sensations, as to the nature of their opposition. But the facts are facts, so far as the ideas have been combined with the sensations and absorbed in them: the theories are theories, so far as the ideas are kept distinct from the sensations, and so far as it is considered still a question whether those can be made to agree with these.

We may, as I have said, illustrate this matter by considering man as interpreting the phenomena which he sees. He often interprets without being aware that he does so. Thus, when we see the needle move toward the magnet, we assert that the magnet exercises an attractive force on the needle. But it is only by an interpretative act of our own minds that we ascribe this motion to attraction. That, in this case, a force is exerted—something of the nature of the pull which we could apply by our own volition—is our interpretation of the phenomena; although we may be conscious of the act of interpretation, and may then regard the attraction as a fact.

Nor is it in such cases only that we interpret phenomena in our own way, without being conscious of what we do. We see a tree at a distance, and judge it to be a chestnut or a lime; yet this is only an inference from the color or form of the mass according to preconceived classifications of our own. Our lives are full of such unconscious interpretations. The farmer recognizes a good or a bad soil; the artist a picture of a favorite master; the geologist a rock of a known locality—as we recognize the faces and voices of our friends; that is, by judgments formed on what we see and hear; but judgments in which we do not analyze the steps, or distinguish the inference from the appearance. And in these mixtures of observation and inference, we speak of the judgment thus formed as a fact directly observed.

Even in the case in which our perceptions appear to be most di-

rect, and least to involve any interpretations of our own, in the simple process of seeing—who does not know how much we, by an act of the mind, add to that which our senses receive? Does any one fancy that he sees a solid cube? It is easy to show that the solidity of the figure, the relative position of its faces and edges to each other, are inferences of the spectator; no more conveyed to his conviction by the eye alone than they would be if he were looking at a painted representation of a cube. The scene of nature is a picture without depth of substance, no less than the scene of art; and in the one case as in the other, it is the mind which, by an act of its own, discovers that color and shape denote distance and solidity. Most men are unconscious of this perpetual habit of reading the language of the external world, and translating as they read. The draughtsman, indeed, is compelled, for his purposes, to return back in thought from the solid bodies which he has inferred, to the shapes of surface which he really sees. He knows that there is a mask of theory over the whole face of nature, if it be *theory* to infer more than we *see*. But other men, unaware of this masquerade, hold it to be a fact that they see cubes and spheres, spacious apartments and winding avenues. And these things are facts to them, because they are unconscious of the mental operation by which they have penetrated nature's disguise.

And thus, we still have an intelligible distinction of fact and theory, if we consider theory as a conscious, and fact as an unconscious, inference, from the phenomena which are presented to our senses.

But still, theory and fact, inference and perception, reasoning and observation, are antithesis in none of which can we separate the two members by any fixed and definite line.

Even the simplest terms by which the antithesis is expressed cannot be separated. Ideas and sensations, thoughts and things, subject and object, cannot in any case be applied absolutely and exclusively. Our sensations require ideas to bind them together, namely, ideas of space, time, number, and the like. If not so bound together, sensations do not give us any apprehension of things or objects. All things, all objects, must exist in space and in time—must be one or many. Now space, time, number, are not sensations or things. They are something different from and opposed to sensations and things. We have termed them ideas. It may be said they are *relations* of things, or of sensations. But granting this form of expression, still a *relation* is not a thing or a sensation; and therefore we must still have another and opposite element along with our sensations. And yet, though we have thus these two elements in every act of perception, we can-

not designate any portion of the act as absolutely and exclusively belonging to one of the elements. Perception involves sensation, along with ideas of time, space, and the like; or, if any one prefers the expression, we may say, perception involves sensations along with the apprehension of relations. Perception is sensation, along with such ideas as make sensation into an apprehension of things or objects.

And as a perception of objects implies ideas, as observation implies reasoning, so, on the other hand, ideas cannot exist where sensation has not been; reasoning cannot go on when there has not been previous observation. This is evident from the necessary order of development of the human faculties. Sensation necessarily exists from the first moments of our existence, and is constantly at work. Observation begins before we can suppose the existence of any reasoning which is not involved in observation. Hence, at whatever period we consider our ideas, we must consider them as having been already engaged in connecting our sensations, and as having been modified by this employment. By being so employed, our ideas are unfolded and defined; and such development and definition cannot be separated from the ideas themselves. We cannot conceive space without boundaries or forms; now forms involve sensations. We cannot conceive time without events which mark the course of time; but events involve sensations. We cannot conceive number, without conceiving things which are numbered; and things imply sensations. And the forms, things, events, which are thus implied in our ideas, having been the objects of sensation constantly in every part of our life, have modified, unfolded, and fixed our ideas to an extent which we cannot estimate, but which we must suppose to be essential to the processes which at present go on in our minds. We cannot say that objects create ideas; for to perceive objects we must already have ideas. But we may say that objects and the constant perception of objects have so far modified our ideas that we cannot, even in thought, separate our ideas from the perception of objects.

We cannot say of any ideas as of the idea of space, or time, or number, that they are absolutely and exclusively ideas. We cannot conceive what space, or time, or number, would be in our minds, if we had never perceived any thing or things in space or time. We cannot conceive ourselves in such a condition as never to have perceived any thing or things in space or time. But, on the other hand, just as little can we conceive ourselves becoming acquainted with space and time or numbers as objects of sensation. We cannot reason without having the operations of our minds affected by previous sensations; but we cannot conceive reason-

ing to be merely a series of sensations. In order to be used in reasoning, sensation must become observation; and, as we have seen, observation already involves reasoning. In order to be connected by our ideas, sensations must be things or objects, and things or objects already include ideas. And thus, none of the terms by which the fundamental antithesis is expressed can be absolutely and exclusively applied.

I will make a remark suggested by the views which have thus been presented. Since, as we have just seen, none of the terms which express the fundamental antithesis can be applied absolutely and exclusively, the absolute application of the antithesis in any particular case can never be a conclusive or immovable principle. This remark is the more necessary to be borne in mind, as the terms of this antithesis are often used in a vehement and peremptory manner. Thus we are often told that such a thing is a *fact*, A FACT and not a theory, with all the emphasis which, in speaking or writing, tone or italics or capitals can give. We see from what has been said, that when this is urged, before we can estimate the truth or the value of the assertion, we must ask to whom is it a fact? What habits of thought, what previous information, what ideas does it imply, to conceive the fact as a fact? Does not the apprehension of the fact imply assumptions which may with equal justice be called theory, and which are perhaps false theory? in which case the fact is not a fact. Did not the ancients assert it as a fact, that the earth stood still, and the stars moved? and can any fact have stronger apparent evidence to justify persons in asserting it emphatically than this had?

These remarks are by no means urged in order to show that no fact can be certainly known to be true; but only to show that no fact can be certainly shown to be a fact merely by calling it a fact, however emphatically. There is by no means any ground of general skepticism with regard to truth, involved in the doctrine of the necessary combination of two elements in all our knowledge. On the contrary, ideas are requisite to the essence, and things to the reality, of our knowledge in every case. The proportions of Geometry and and Arithmetic are examples of knowledge respecting our ideas of space and number, with regard to which there is no room for doubt. The doctrines of Astronomy are examples of truths not less certain respecting the facts of the external world. — *Whewell's History of Scientific Ideas*, vol. i. bk. i. pt. i. ch. i. s. 10.*

* For a very interesting article upon "FACT AND FICTION," see 20 *Blackwood's Magazine*, 681.

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